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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-40

WESTERN OIL & GAS ASSOCIATION, ET AL., *Petitioners,*

v.

STATE OF ALASKA, ET AL., *Respondents,*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Western Oil & Gas Association (WOGA) and the eleven WOGA members who appeared as appellees and as intervening defendants below[1] petition this Court for a writ of certiorari to review a decision entered by the United States Court of Appeals for the District of Columbia Circuit on February 24, 1978.

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[1] The other eleven petitioners here are Amoco Production Co., Champlin Petroleum Co., Cities Service Co., Continental Oil Co., Exxon Corp., Gulf Oil Corp., Mobil Oil Corp., Murphy Oil Corp., Ocean Production Co., Shell Production Co., and Sun Oil Co.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. A copy of that opinion appears in the Appendix at pages 1a-48a. The order of the Court of Appeals denying petitioners' motion for rehearing appears in the Appendix at page 50a, and its judgment appears at page 49a. The memorandum opinion and judgment entered by the United States District Court for the District of Columbia on August 13, 1976, is not officially reported, but is reproduced in the Appendix at pages 51a-66a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on February 24, 1978. Petitioners' timely motion for rehearing was denied on April 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the court of appeals erred in construing Section 8 of the OCS Lands Act, 43 U.S.C. § 1337, which provides that all Outer Continental Shelf oil and gas leases issued by the Secretary of the Interior "shall . . . be for a period of five (5) years and as long thereafter as oil and gas may be produced . . . ," as allowing the issuance of leases that can be terminated at any time without compensation to the lessee?

(2) Whether the court of appeals erred in issuing a declaratory judgment so construing the OCS Lands Act, in the light of the facts that

(a) the question of this construction of the OCS Lands was not treated as a major issue by the parties;

(b) after oral argument in the court of appeals, the court was informed that the Secretary had changed his position and agreed with the plaintiffs, although not with WOGA, that he could terminate OCS leases without payment of compensation; and

(c) Congress is considering bills, which have passed both Houses, that would modify the OCS Lands Act in a fashion contrary to the construction of the court of appeals?

STATUTES INVOLVED

Section 5(a)(1) of the OCS Lands Act, 43 U.S.C. § 1334(a)(1), provides as follows:

> "The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and,

in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production."

Section 8(b)(2) of the OCS Lands Act, 43 U.S.C. § 1337(b)(2) provides as follows:

> "An oil and gas lease issued by the Secretary pursuant to this section shall . . . be for a period of five years and as long thereafter as oil or gas may be produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon, ..."

STATEMENT OF THE CASE

This case was originally brought under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, to prevent, and was subsequently pursued to nullify, the Secretary of the Interior's sale of oil and gas leases on that portion of the Outer Continental Shelf (OCS) known as the Northeast Gulf of Alaska. The sale of these leases—styled OCS Sale No. 39 [2]—was ultimately upheld by both the district court and the court of appeals. WOGA strongly urged as an intervening defendant below that Sale No. 39 be sustained,

[2] Although referred to as "sales," OCS transactions of the type at issue here involve the issuance of leases which give lessees the right to explore for and then develop and produce oil or gas underlying their tracts. These leasehold rights are sold for substantial cash bonuses via a competitive bidding system. They also entail the obligation of paying the federal government annual rentals and substantial royalties.

and it therefore does not seek to have this Court review this aspect of the decision below.

The court of appeals, however, also entered a declaratory judgment which drastically alters the Secretary's administration of OCS leasing by authorizing him to issue leases, in which tens or even hundreds of millions of dollars may be invested, that he can subsequently take back without the payment of any compensation. Accordingly, petitioners have been compelled to invoke this Court's certiorari jurisdiction to review this aspect of the decision below.

A. Pre-Sale Developments

As part of the program to expand OCS production of oil and gas to reduce the Nation's dependency on foreign imports (App. 61a-62a), the Department of the Interior in late 1974 focused on leasing OCS tracts in the Gulf of Alaska. After publication of a draft impact statement and the conduct of public hearings on the draft, a final environmental impact statement (EIS) for a proposed Gulf of Alaska leasing of 1.8 million acres was published in late 1975.

The publication of this EIS led to extensive consultation between the lead plaintiff here, the State of Alaska, and various federal agencies—Interior, the Council on Environmental Quality (CEQ), the Environmental Protection Agency (EPA), and the National Oceanographic and Atmospheric Administration (NOAA)—as to a possible reshaping of the sale in response to information contained in the EIS. As a result of this consultation, the leasing proposal was reduced by approximately 40% to 1.1 million acres and the Secretary took a number of other actions responsive to the concerns voiced by Alaska and the federal

environmental agencies.[3] (App. 57a). Moreover, just prior to the sale, the Secretary eliminated an additional 92,000 acres, which were of particular concern to the State. (App. 57a).

Thus, as a result of the NEPA process, the scope of Sale No. 39 was significantly reduced and the sale was conditioned to mitigate substantially its environmental impacts. Indeed, the chairman of CEQ "commended the Department" of the Interior for "improv[ing] the substance and process of OCS decision making" by engaging in the consultative process which led to the reduction of the proposed sale area and the conditioning of the sale to deal with CEQ's and others' environmental concerns:

> "[T]he council has also been impressed with the Department's clear commitment to incorporate the best and most recent environmental information available into the preparations for or decision on this lease sale. The Department appears to us to be approaching this matter even-handedly and a number of environmentally protective options are being considered in the decision-making process." (JA 234).

The State of Alaska and several other Alaskan plaintiffs nonetheless sued in the United States District Court for the District of Columbia to enjoin Sale No. 39 several weeks before it was scheduled to

[3] Specifically, the OCS operating orders, which regulate in detail all aspects of OCS operations, were revised to incorporate in "substantial measure" the recommendations made by CEQ and EPA; a two-year moratorium upon the leasing of any additional portions of OCS acreage in the Gulf of Alaska was imposed; and EPA's suggestion that lessees provide state and local governments with needed information for onshore planning was adopted. (App. 57a).

take place.[4] Plaintiffs' principal claim was that the Secretary should have awaited the compilation of additional information as to the environmental impact of the sale before authorizing it. However, their complaint also charged (as part of a list of 13 other alleged EIS defects) inadequate discussion of the alternative of including a provision in OCS leases allowing their termination for unforeseen environmental hazards. Reflecting their lack of emphasis of this issue, plaintiffs' preliminary injunction memorandum failed even to mention the claim that OCS leases should contain such termination clauses.

On April 8, 1976, the district court denied plaintiffs' motion for a preliminary injunction. Four days later, the court of appeals denied plaintiffs' request for an injunction pending appeal, and the sale took place the next day, on April 13, 1976, as scheduled.

B. The Sale and Post-Sale Developments

Although leases covering approximately one million acres were offered at Sale No. 39, about 400 thousand acres were actually leased for bonus payments of nearly $560 million.

Thereafter in August, 1976, the parties submitted the case on the merits to the district court. Although once again stressing other matters, plaintiffs did devote a short section of their trial brief (pp. 29-30) to the contention that the Secretary should have considered the alternative of issuing leases with clauses

[4] In addition to the state, the City of Yakutat, United Fishermen of Alaska and the Cordova District Fisheries Union joined in the litigation.

permitting him to cancel leases without compensation to lessees. On August 13, 1976, the district court entered final judgment for the federal and WOGA defendants. (App. 65a-66a).

When plaintiffs returned to the court of appeals to seek review of the district court's final judgment, they proclaimed that they sought appellate action "to declare [Sale No. 39] invalid." (Br. 3). In their briefs and oral argument in support of their contention that Sale No. 39 should be invalidated, plaintiffs once again focused principally upon whether the information in the EIS was sufficient to permit the Secretary to proceed with Sale No. 39 and secondarily upon the claim that the EIS insufficiently discussed the Gulf of Alaska OCS operating orders (see p. 6, n. 3, *supra*).

Plaintiffs devoted significantly less attention to their several other claims. Thus, the contention that the EIS was deficient because it did not consider the alternative of utilizing terminable leases received only two and one-half pages of discussion in plaintiffs' 70-page opening brief.[5] This issue was similarly downplayed in the oral argument which was presented to the court of appeals on January 17, 1977.

Although the termination issue thus received little attention from the parties, the Department of the Interior's subsequent actions apparently caused the D.C. Circuit to give heightened attention to this question. The Secretary, like WOGA, had argued in his appellate brief that the OCS Lands Act does not authorize the use of clauses in OCS leases that would allow their termination without compensation to the

[5] In the light of plaintiffs' treatment of the issue, WOGA allotted only four of the 68 pages of its brief to the termination question.

lessee. However, on July 14, 1977, Interior published a notice of proposed rulemaking (which plaintiffs promptly filed with the D.C. Circuit) in which the Department repudiated the view taken in its brief with respect to the Secretary's termination authority. See 42 Fed. Reg. 36,273; 36,277.[6] While receiving this notice, the court of appeals invited no further comment from the Secretary (and none was offered by him) to explain this change in position.

On February 24, 1978, the court of appeals handed down its decision on the merits. In an opinion written by Judge Bazelon, the court rejected plaintiffs' chief contention that the Secretary should not have gone forward with Sale No. 39 without undertaking further environmental study of the sale area.

Of significance here, however, the court of appeals went on in a lengthy section of its opinion (App. 32a-42a) to hold that the Secretary could, under the OCS Lands Act, issue leases containing clauses that would allow him to terminate operations without compensation to lessees upon the discovery of unforeseen environmental hazards. Having so construed the OCS Lands Act, the court also held that under NEPA the

[6] The variation between the position taken by the Department in the brief filed with the court of appeals in late 1976 and the view taken in the July 1977 regulations is vividly illustrated by their conflicting attitudes toward Union Oil Co. v. Morton, 512 F.2d 743 (9th Cir. 1975). In its appellate brief, the government argued that under *Union Oil* the Secretary had no authority to condition OCS leases to make them terminable upon the subsequent discovery of environmental hazards. (Fed. Br. 49). In the July 1977 proposed regulations, the Department took the position that the *Union Oil* case permitted the Secretary to so condition OCS leases. *See* 42 Fed. Reg. at 36,274.

Secretary should have considered the use of terminable leases in the EIS as an alternative to the proposed action.'

In so ruling, however, the court recognized that the use of termination clauses constituted only a "partial alternative" to Sale No. 39—*i.e.* "a different, presumably less environmentally harmful means, of conducting such sale." (App. 44a). For this reason and also because inserting termination clauses in the $560 million worth of Sale No. 39 leases that had already been issued "would create grave legal tangles" (App. 46a), the court declined to hold that the "defect" in the EIS, which it had identified, affected the validity of the Secretary's decision to proceed with Sale No. 39.

Instead of thus dismissing this aspect of plaintiffs' complaint against Sale No. 39, the court of appeals proceeded to render a declaratory judgment that the OCS Lands Act empowers the Secretary to insert termination clauses into OCS leases and that the Secretary must consider the use of leases with such clauses in conducting all future OCS sales.

WOGA filed a timely petition for rehearing as to that portion of the court's opinion dealing with the termination issue and identified important developments that had occurred after oral argument which

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[1] The court of appeals also found that the EIS contained inadequate discussion of the operating orders and remanded that portion of the case for further consideration by the Secretary. However, the court rejected plaintiffs' request to invalidate Sale No. 39 on this basis, noting that the operating orders could be changed after the lease sale had been held. *See* County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1381-82 (2d Cir. 1977), *cert. denied*, —— U.S. ——, 98 S.Ct. 1238 (1978). Petitioners do not seek review of this aspect of the court of appeals' decision.

demonstrated that the court should have modified its decree: First, that the Department of the Interior's July 1977 proposed termination regulations had been adopted on October 4, 1977, and were being challenged by WOGA in litigation devoted solely to the proper construction of the OCS Lands Act (*Western Oil & Gas Association, et al.*, v. *Andrus*, No. 77-3987—L.E.W. (C.D. Cal.)); Second, that both Houses of Congress had passed amendments to the OCS Lands Act which would provide for environmentally motivated lease cancellation, ableit unlike the scheme envisioned by the court of appeals, with compensation to the lessee.

On April 24, 1978, the court of appeals denied WOGA's petition for rehearing.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit has construed the OCS Lands Act as authorizing the use of leases which are terminable without compensation in situations where the lessee is entirely without fault. From the time of its enactment in 1953 until the submission of this case to the court of appeals nearly 25 years later, the OCS Lands Act had been consistently construed by the Department of the Interior to require the issuance of leases that could not be so terminated except upon the government's payment of just compensation to the lessee. Pursuant to this interpretation of the Act, Interior had, as of 1975, conducted over thirty OCS lease sales "in which 1,940 leases, embracing over eight million acres, have been issued." *United States* v. *Maine*, 420 U.S. 515, 527 (1975). As of 1977, the federal government had received more than 18 billion dollars in

bonuses, rental payments and royalties from OCS lessees.[8]

The court of appeals' construction of the OCS Lands Act would thus radically modify OCS leasing. Because that construction of the Act is so patently at variance with its terms and legislative history, and because the court of appeals rendered a declaratory judgment with respect to this issue in a case, at a time, and under circumstances which called for restraint, as opposed to judicial revision of a statute, petitioners submit that the issues raised in this petition make it a compelling vehicle for the exercise of this Court's certiorari jurisdiction.

I

The central mechanism underlying the OCS program, and the one which most clearly reflects the finely-tuned legislative scheme established by Congress, is the OCS lease itself. Section 8(b)(2) of the OCS Lands Act, 43 U.S.C. § 1337(b)(2), specifies the lease-term provisions required to be inserted in every OCS lease:

> "An oil and gas lease issued by the Secretary pursuant to this section *shall* . . . be for a period of five (5) years *and* as long thereafter as oil and gas may be produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon, . . ." (emphasis supplied).

[8] See, Outer Continental Shelf Lands Act Amendments of 1977, S. Rep. No. 95-284, 95th Cong., 1st Sess. p. 49 (1977).

This language is mandatory, not discretionary; the Secretary is required to issue leases for a minimum period of five years and must extend the leases under carefully defined circumstances.

In adopting the language of Section 8(b), Congress was simply directing the Secretary to follow what has long been common practice in the issuance of mineral leases.[9] This lease form, which is typical of "virtually all contemporary [mineral] leases," 3 Williams & Meyers, *Oil and Gas Law,* § 601.4, at 7, was evolved after decades of experience and reflects the accommodation of the interests of both lessees and lessors. The short initial term benefits the lessor by compelling the lessee to begin production as soon as possible, *id.*, while the "habendum" or "thereafter" clause guarantees the lessee the opportunity to realize a return on his investment, *id.* at § 601.1, at 2-3.

The interpretation of the Act proposed by the court below upsets this careful balance. For the court of appeals has now, in effect, revised the statute so as to

[9] The lease form prescribed by Section 8(b) was essentially derived from the Mineral Leasing Act of 1920, 30 U.S.C. § 226(e):

> "Competitive leases issued under this section shall be for a primary term of five (5) years and noncompetitive leases for a primary term of ten (10) years. Each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities . . . ."

The court of appeals relied on Boesche v. Udall, 373 U.S. 472 (1963), a case decided under the Mineral Leasing Act. (App. 38a-39a). But that decision held that the Secretary of the Interior had authority to cancel leases administratively for technical errors in their issuance. In so holding, this Court carefully distinguished between technical defects of that nature and "*post-lease* events" 373 U.S. at 478 (emphasis in original). The subsequent discovery of environmental hazards is, of course, a classic example of a "post-lease event" not at issue in *Boesche*.

vest the Secretary with discretion to cancel OCS leases for reasons wholly outside the control of the lessee, without any obligation to pay the lessee compensation for a lease in which millions of dollars may have been invested.

The lower court's reliance upon Section 5(a)(1) of the Act, 43 U.S.C. § 1334(a)(1), does not excuse its failure to adhere to the terms of Section 8(b). That section merely gives the Secretary general authority to *regulate* OCS operations *after* leases are issued. *See, County of Suffolk* v. *Secretary of Interior, supra,* 562 F.2d at 1381-82; *Sierra Club* v. *Morton,* 510 F.2d 813 (5th Cir. 1975).

Moreover, the very terms in which Section 5(a) spells out the contours of the Secretary's regulatory authority show that Congress did not arm him with the termination power the court below now suddenly finds in his arsenal:

> "Without limiting the generality of the foregoing provisions of the section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, *suspension of operations or production,* reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production." (emphasis supplied).[10]

[10] It is now settled that the Secretary of the Interior has the authority to suspend OCS operations—i.e. to order their cessation for a limited period of time—upon the discovery of environmental hazards. See Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973).

Congress' use of the term "suspension," as opposed to "termination" or "cancellation" was not inadvertent. Indeed, the very next section of the Act, 43 U.S.C. § 1334(b)(1), outlines the circumstances—all of which involve fault on the part of the lessee and thus do not support the decision below—when termination is permissible:

> "Whenever the owner of a nonproducing lease *fails to comply* with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease . . . such lease may be cancelled by the Secretary. . . ." (emphasis supplied).

Moreover, the legislative history of the Act shows clearly that Congress knew what it meant when it authorized "suspension," but not "termination" or "cancellation" of leasehold rights in Section 5(a). As the bills underlying the 1953 Act went into conference, the predecessor of Section 12 (43 U.S.C. § 1341) provided that "in time of war or where necessary for national defense" the Secretary could "terminate any lease," albeit with liability "to the lessee for just compensation." In conference, the section was modified into its present form for reasons which show the clear distinction recognized by the conferees between "suspension" and "termination:"

> "No Authority to Terminate Leases."
>
> "On page 42 appears amendment No. 21, in line 10, and again in line 13. That amendment strikes out the language which would give the Secretary of the Interior, upon a recommendation of the Secretary of State, during a period of war or national emergency, the right to terminate leases. *He would still have the right to suspend operation under leases, but not to terminate leases;*

and the words 'or to terminate,' in line 10, are stricken out; and in lines 13 and 14 the words 'or whose lease thus terminated' are also stricken out." 99 Cong. Rec. 10,474 (1953) (emphasis added).

Not only does this change in the statute show that Congress was acutely aware of the distinction between termination and suspension, but also it shows a strong aversion to vesting termination authority in the Secretary. Since Congress was unwilling to sanction no-fault termination in times of national emergency—the most compelling circumstance for the exercise of such a termination power—it surely did not contemplate termination for the reasons identified by the D.C. Circuit.

This conclusion is further reinforced by other parts of the Act's legislative history. Thus, the Report of the Senate Committee on Interior and Insular Affairs accompanying the OCS Act states:

> "Both Senate and House Bills authorize the Secretary to make new oil and gas leases. The House bill establishes a permanent procedure, with detailed provisions (House Bill, sec. 10); the Senate bill is designed only to meet 'the present emergency' and imposes a minimum of restrictions on the complete discretion of the Secretary (S. 1901, sec. 8). It is believed that a permanent procedure is preferable; *the practice of limiting the Secretary's discretion as to leasing procedure and lease provisions follows the precedent of the Mineral Leasing Act, and is not objectionable.*" S. Rep. No. 411, 83rd Cong., 1st Sess. 36 (1953). (emphasis supplied).

The court below, contrary to this legislative history, grants broad discretion to the Secretary as to leasing

provisions. In embracing such a discretionary view of the Act, the D.C. Circuit brought itself into direct conflict with the view of the statute previously articulated by the Ninth Circuit in construing the scope of the Secretary's regulatory authority under Section 5(a) of the OCS Lands Act—*Union Oil Co.* v. *Morton,* 512 F.2d 743 (9th Cir. 1975).

In *Union Oil,* a lessee challenged the Secretary's *de facto* termination of a lease by virtue of his refusal to permit installation of a drilling platform on an OCS tract. The court ruled against the Secretary in terms which clearly conflict with the D.C. Circuit's view that the Secretary has broad discretion to place termination clauses in OCS leases:

> "[A]lthough 43 U.S.C. § 1334(a)(1) authorizes regulations providing not only for suspensions but for any other action affecting operations which the Secretary determines 'necessary and proper' for 'conservation of natural resources,' *Congress clearly did not intend to grant leases so tenuous in nature that the Secretary could terminate them, in whole or in part, at will.*" 512 F.2d at 750 (emphasis added) (footnote omitted).

The decision below permits the Secretary to do precisely what *Union Oil* says Congress prohibited—i.e., to use his powers under Section 5 of the OCS Lands Act to grant leases which are "so tenuous in nature that the Secretary could terminate them, . . . at will."

II

We have demonstrated in Part I above that the D.C. Circuit fundamentally misconstrued the OCS Lands Act. The circumstances leading up to this misconstruction of the Act help to explain how the court of appeals might have made such a mistake. They also

demonstrate, as an independent basis for the issuance of the writ of certiorari which WOGA here seeks, that the D.C. Circuit ignored settled principles established by this Court to assure that declaratory relief is provided only in cases where it is clearly warranted. *See Powell* v. *McCormick,* 395 U.S. 486 (1969); *Golden* v. *Zwickler,* 394 U.S. 103 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270 (1941); *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227 (1937).

As noted in the statement of the case (pp. 7-8, *supra*) the termination issue received little attention from the parties in their presentation of this case to the court of appeals. Moreover, the court of appeals refused to apply its construction of the Act to the sole issue before it in this litigation (the validity of the Secretary's Sale No. 39 decision), and the Department changed position with respect to the termination issue and came into agreement with the plaintiffs on this question. Thus, this was not a case where the parties had the necessary "adverse legal interests, of sufficient immediacy and reality" to support the issuance of a declaratory judgment.[11]

There is, moreover, a further compelling reason for reversing the lower court's declaratory judgment. As WOGA pointed out in its petition for rehearing in the court of appeals, at the very time this case was under submission, the Congress was (as it still is) giving focused attention to the question of how best to deal with the discovery of unanticipated environmental hazards on OCS leases. That fact should have been, but was not, considered by the court of appeals in issuing

[11] Maryland Casualty Co. v. Pacific Coal & Oil Co., *supra,* 312 U.S. at 273.

a declaratory judgment as to the termination question.[12] For as this Court held in *A. L. Mechling Barge Lines, Inc.* v. *United States,* 368 U.S. 324, 331 (1961), declaratory relief should be withheld when "it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted."

The fact is, to the extent that predictions can be made about the type of "termination" provision which Congress might enact, it seems it would be far different than the scheme envisioned by the court of appeals in its declaratory judgment. At the outset of the 95th Congress, bills were introduced in both the Senate (S.9) and the House (H.R. 1614) to authorize the Secretary to cancel leases for environmental, as well as other reasons. Both bills would amend Section 5(a) of the 1953 Act to direct the Secretary to promulgate detailed regulations providing for cancellation of an OCS lease under specifically defined circumstances. H.R. Rep. No. 95-590, Ad Hoc Select Committee on the OCS, 95th Cong., 1st Sess., p. 8 (1977).[13]

Unlike the lower court's construction of the 1953 Act, however, the proposed legislation clearly requires

[12] WOGA's brief on the merits indicated that Congress was considering proposed amendments to the OCS Lands Act bearing upon the use of termination clauses in OCS leases. As noted above, p. 11, WOGA's petition for rehearing advised the court below that both Houses of Congress had passed bills which would allow for the termination of OCS leases, albeit with compensation to the lessee.

[13] The Senate bill similarly would allow the Secretary to cancel leases for environmental reasons. *See* 123 Cong. Rec. S11986 (daily ed. July 15, 1977).

that compensation be paid to lessees when their leases are cancelled. Thus, as it was reported out of committee, H.R. 1614 provided that in

> "the case of a lease issued after the date of the enactment of this paragraph . . . the lessee [shall be entitled] to receive such compensation as he shows to the Secretary as being equal to the lesser of (I) the fair value of the cancelled rights as of the date of cancellation, . . . or (II) the excess, if any, over the lessee's revenues from the lease (plus interest thereon from the date of receipt to the date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee . . . ;
>
> "in the case of a lease issued before the date of the enactment of this paragraph . . . the lessee [shall be entitled] to receive fair value in accordance with subclause (I) [above]" (House Report at 8).[14]

This provision was adopted in the face of hearing testimony embodying an argument—strikingly similar to the position adopted by the lower court—that OCS lessees should be forced to bear the risk of lease cancellation:

> "I would modify the provision regarding lease cancellations by explicitly prohibiting compensation for cancellation of leases issued pursuant to this proposed law. The risk of lease cancellation for environmental reasons is financially similar to the risk of not discovering commercial resources. Potential bidders routinely consider such risks when deciding what they will bid." Hearings on H.R. 1614 before the Ad Hoc Select Committee on the OCS, House of Representatives, 95th Cong., 1st Sess., p. 663 (1977).[15]

[14] The Senate bill has a similar compensation provision (S. 9, § 204, amending § 5(a)(2), 123 Cong. Rec. 11,986).

It is clear from the House Committee's action in reporting out a bill which does provide for compensation to lessees that this view was rejected. Any doubts on this score are put to rest by the House Committee's report:

> "The committee wishes also to insure that adequate compensation would be granted to a lessee or permittee when cancellation occurs through no fault of the lessee or permittee . . . . Cancellation for environmental reasons would be compensated. . . ." (House Report at 132).

Moreover, the further revision of the bill after it was reported out of committee, underscores the House's intent with respect to this question. At that time, Congressman Wiggins of California succeeded in amending the bill to provide the constitutional measure of "just compensation" to lessees whose leases were cancelled for environmental reasons. 124 Cong. Rec H414 (daily ed. January 31, 1978). As he explained the amendment which the House then adopted:

> "The record of our ad hoc committee, and surely the debate thus far in this House, establishes no compelling reasons for refusing to pay a tenant his just compensation. The only reason that comes to mind is that we are frugal, and do not want to do so. That, I suggest, is not an overriding na-

[15] In much the same manner, the lower court reasoned that

> "OCS leases are inherently risky investments; and since termination clauses could make such investments riskier still, potential lessees might well be unwilling to pay as much for leases with such clauses as they would pay for leases without them." (App. 41a).

tional interest which would justify the denial to a lessee of constitutional rights." *Id.* at H413.

The bill which passed the Senate on July 15, 1977, also amends section 5(a) of the OCS Lands Act to provide for cancellation of OCS Leases with payment of compensation (123 Cong. Rec. 11,986).[16] Thus, it is clear that both Houses of Congress believe it is in the public interest to require that any termination power which is given to the Secretary be accompanied by a corresponding obligation to compensate lessees for the cancellation of their leases, rather than to invest Interior with the unqualified power to deprive an OCS lessee of an asset in which it has invested millions upon millions of dollars.

These recent developments in Congress further strengthen the showing made in Part I above that Congress has always recognized that OCS leases should be structured in a fashion to create fixed property interests, rather than being subject to the discretionary authority of the Secretary in the manner contemplated by the court of appeals. These developments also reveal the error in the D.C. Circuit's present exercise of its declaratory judgment jurisdiction with respect to the termination question.

Although both Houses of Congress have proposed amendments to the OCS Lands Act providing termination with compensation, neither House considered the general provisions of Section 5 as interpreted by the court below in issuing its declaratory judgment. It

[16] Senate and House conferees were appointed to resolve the differences between the two Houses in March of this year (124 Cong. Rec. at S3964, H2269, daily ed. March 17, 21, 1978). To date, no conference report has been issued on the pending bills.

is true, of course, that the bills now pending before the Conference Committee could be amended to correct the error made by the D.C. Circuit in its interpretation of the statute. It is obvious, however, that Congress may simply enact the proposals now before the Conference Committee, almost certainly spawning litigation as to the continuing effect of the D.C. Circuit's construction of the OCS Lands Act.

Under these circumstances, this case constitutes a most compelling occasion for the enforcement of the rule of *A. L. Mechling Barge Lines* v. *United States, supra.* Indeed, this is a classic case of the need for judicial deference to the legislature, rather than "creative" statutory construction, since only Congress can provide the compensation arrangements that are necessary for the fair treatment of lessees whose leases are cancelled for reasons entirely beyond their control.

CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1978

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1829

STATE OF ALASKA, et al., APPELLANTS

v.

CECIL D. ANDRUS, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 76-0368)

Argued January 17, 1977

Decided February 24, 1978

Sanford Sagalkin, Assistant Attorney General, Alaska of the Supreme Court of Alaska *pro hac vice* by special leave of Court and *Bruce J. Terris* with whom *Avrum M. Gross*, Attorney General, Alaska was on the brief, for appellants.

Kathryn A. Oberly, Attorney, Department of Justice, with whom *Peter R. Taft*, Assistant Attorney General, *Raymond N. Zagona* and *William M. Cohen*, Attorneys, Department of Justice, were on the brief, for federal appellees. *Edmund B. Clark*, Attorney, Department of Justice also entered an appearance for federal appellees.

E. Edward Bruce for appellees, Western Oil and Gas Association, et al.

Before: BAZELON, *Chief Judge*, LEVENTHAL and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: On April 13, 1976, the Department of the Interior (DOI) offered for bid over one million acres of oil and gas leases in the Gulf of Alaska (GOA) Outer Continental Shelf (OCS). Appellants challenge the legality of that lease sale and seek to have it set aside. They argue both that the Environmental Impact Statement (EIS) prepared by DOI in connection with the sale does not satisfy the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and that the Secretary of the Interior's decision to proceed with the sale in April, 1976 was itself a violation of the Act, because of the alleged inadequacy of the information available to the Secretary at that time. Appellants originally sought to enjoin the sale; however, the district court denied their motion for a preliminary injunction, and this court refused to grant appellants an injunction pending appeal. DOI was thus able to conduct the sale on April 13 as planned. Thereafter, the parties agreed to submit the case on the merits to the district court on the basis of the record compiled at the preliminary injunction stage of the proceedings; the district court concluded that the appellees had complied with all applicable statutes, and entered a final judgment dismissing the complaint.

We have determined that, on the facts of this case, it would be inappropriate for us to set aside the lease sale and to enjoin the exploratory drilling now underway in the Gulf of Alaska. However, this is on the premise that the Secretary's undertaking prior to the sale, to confine environmental damage through departmental operating orders governing exploration and drilling, will be given meaningful effect through prompt reconsideration of the operating orders already issued, with an environmental impact statement that presents discussion of alternatives.

I. BACKGROUND OF LEASE SALE NO. 39

On January 23, 1974, former President Nixon announced that as part of "Project Independence" [1] he was directing the Secretary of the Interior "to increase the acreage leased on the Outer Continental Shelf to 10 million acres beginning in 1975, more than tripling what had originally been planned." [2] The President ordered the Secretary, in carrying out this directive, "to ensure that . . . environmental safeguards are observed." [3] In addition, the President pointed out that there would be "no decision on leasing on the Outer Continental Shelf in the Atlantic and in the Gulf of Alaska until the Council on Environmental Quality [CEQ] completes its current environmental study of those areas." [4]

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[1] "Project Independence" was the name the former President gave to his program, announced on November 7, 1973, to free the United States from dependence on foreign sources of oil. *See* 9 Compilation of Presidential Documents 1309, 1317 (1973).

[2] 10 Compilation of Presidential Documents 69, 84 (1974), J.A. at 365.

[3] *Id.*

[4] *Id.*

The CEQ study to which the President referred was released on April 18, 1974.[5] That study concluded that the environmental risks associated with OCS development varied from region to region but that of the regions studied, development in the Eastern Gulf of Alaska would pose the *highest* level of environmental risks.[6] Indeed,

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[5] Council on Environmental Quality, *OCS Oil and Gas—An Environmental Assessment: A Report to the President by the Council on Environmental Quality* (1974) (CEQ Report), Record No. 7, Exhibit 3.

[6] *Id.* at 6. The National Academy of Sciences prepared a critique of the CEQ study which was included as a part of that study. The NAS agreed with CEQ that development in the Gulf of Alaska would entail "high risk," *id.* at 194, and concluded that "[i]t is clear that the available data do not recommend the development of OCS resources at the present time in the Gulf of Alaska." *Id.* at 201. *See also* a report prepared for the Environmental Protection Agency, *Energy Development: The Environmental Tradeoffs*, Vol. 3: *Relative Environmental Ranking of Proposed Offshore Continental Shelf Areas on the Basis of Impacts of Oil Spills* (September, 1975) (EPA Report), Record No. 7, Exhibit 17. That study concluded that of ten OCS regions studied, "[t]he regions judged most likely to suffer damage from oil spills are Bristol Bay (Alaska), Cook Inlet (Alaska), and the Gulf of Alaska." *Id.* at 2. See also the EPA's comments on the draft PEIS, dated January 10, 1975:

> [The CEQ] study documented the need for caution in development and assessed frontier areas in order of environmental risk. Some of these areas, especially the Gulf of Alaska, contain unique and vulnerable natural resources combined with significant natural hazards that would make precipitous development highly undesirable from an environmental standpoint.

PEIS, Vol. II, at 380.

The "unique and vulnerable natural resources" to be found in the Gulf of Alaska area include the largest marine mammal habitat in the nation, EPA Report, *supra* at 28, and the most important bird habitat in the world, with the possible exception of the Bering Sea, EIS, Vol. III, at 12. The Gulf is also

CEQ concluded that the "conditions in the Gulf of Alaska are more severe than the [oil and gas] industry has yet experienced anywhere in the world."[7]

On October 18, Interior published a draft programmatic EIS (PEIS) analyzing the President's proposed acceleration of OCS leasing to 10 million acres per year.[8] The Environmental Protection Agency (EPA) reviewed the draft and informed Interior that "in accordance with the EPA rating system for environmental statements, we have classified this statement as Category 3, Inadequate."[9] The statement, in EPA's view, had failed to address "key policy options and managerial issues pertaining to an accelerated OCS oil and gas leasing program."[10] EPA

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an important commercial fishing grounds. EIS, Vol. I, at 197 *et seq.*; EPA Report, *supra* at 24-5. The portion of Alaska bordering on the gulf is a sparsely populated wilderness area possessing a "pristine environment." EIS, Vol. I, at 397.

The "significant natural hazards" in this region include an unusually high susceptibility to serious earthquakes. Of the areas studied in the EPA Report, *supra*, the Gulf is "the most susceptible to severe earthquakes. . . ." *Id.* at 45. Richter 7 earthquakes are predicted to occur every three-to-five years in the Gulf (as opposed to once every 100 years in the Atlantic); Richter 8 earthquakes are predicted once every twenty-five years. CEQ Report, *supra* at 81. In addition, wave heights in the Gulf regularly reach eight feet or more (a factor which would seriously complicate attempts to clean up any oil spills in this region). EIS, Vol. II, at 674-5. Storms are more frequent in the Gulf than anywhere else in the Northern Hemisphere. CEQ Report, *supra* at 78-80.

[7] CEQ Report, *supra* n. 5, at iii.

[8] In California ex rel. Younger v. Morton, 404 F. Supp. 26 (C.D. Cal. 1975), *appeal pending*, No. 76-1431 (9th Cir.), the PEIS was found to satisfy the requirements of NEPA. The adequacy of the PEIS is not at issue here.

[9] PEIS, Vol. II, at 379.

[10] *Id.*

was especially critical of the proposed inclusion of Alaskan OCS areas in the leasing schedule:

> The CEQ Task Force on the OCS, in which DOI participated, states that the petroleum industry would encounter a higher environmental risk in the development of the Gulf of Alaska than in any other area. DOI has not been able to demonstrate that the benefit in oil development outweighs the environmental cost. In fact, *DOI's own data . . . show conclusively that because of material constraints, there is no relative advantage to leasing Alaskan OCS areas at this time despite the magnitude of Alaska's reserves. EPA's position is therefore that leasing in Alaskan waters should not be considered at this time and that substantial technical and biological research is required.* Although we expect that as a result of that research, exploration and subsequent production will be feasible at some point in the future, EPA believes that the point cannot be predicted at this time. *In our opinion, it is therefore neither necessary nor prudent for Alaskan OCS areas to be placed on the leasing schedule at this time.* We think that the future decision should be based on (1) baseline and biological effects research, most of which has not been funded or planned at this time, (2) coastal zone planning, and (3) assessment of operating experience with advanced technologies which can be tested in other OCS areas.[11]

In response to these comments from EPA, and to comments from the State of Alaska and others, Interior indicated that it fully concurred in CEQ's analysis of the relative environmental risks associated with OCS development in various regions,[12] and agreed that development in the Gulf of Alaska would be "highly hazardous."[13]

[11] *Id.* at 386 (emphasis added).

[12] *Id.* at 401.

[13] *Id.* at 98.

"The Gulf of Alaska," it said, "is a high risk area."[14] Nonetheless, Interior's "Proposed Planning Schedule," issued in November, 1974, scheduled the Gulf of Alaska for leasing earlier than any of the other, lower-risk areas examined in the CEQ Study.[15]

A draft "site-specific" EIS (EIS or Sale No. 39 EIS) focusing on this proposed sale in the GOA, was next prepared. The following steps were taken in the preparation of that EIS:

> a. On November 27, 1974, notice of a call for nominations of tracts suitable for oil and gas leasing in the Northern Gulf of Alaska was published in the Federal Register. . . .
>
> b. In this same notice, Interior requested comments from all interested parties on possible oil and gas leasing in the general area of the call for nominations. Interior asked that such comments include, but need not be limited to, environmental, technical, and socioeconomic aspects of potential oil and gas leasing and development in the area.
>
> c. After receipt of numerous nominations and comments pursuant to this notice, the BLM [Bureau of Land Management] Alaska OCS Office and the U.S. Geological Survey (USGS) field office prepared joint tentative tract recommendations.
>
> d. On March 20, 1975, the Secretary publicly announced that certain identified tracts, totaling 3.5 million acres, had been tentatively selected for further environmental study to be made in connection

[14] *Id.* at 401.

[15] *See* J.A. at 93-4. Delays in initiating the leasing program led Interior to issue a revised leasing schedule in June, 1975. EIS, Vol. III, Appendix 1-1. The revised schedule left the order of proposed sales essentially unchanged. *Id.*

with the Department's on-going consideration of a possible OCS lease sale offshore the Northern Gulf of Alaska in 1975.

e. Studies and analyses of potential oil and gas leasing and development of the proposed sale area were undertaken to provide an information base for a draft EIS. BLM's Alaska OCS Office then prepared a draft EIS for proposed lease sale No. 39, which was submitted to the Council on Environmental Quality (CEQ) and made available to federal, state, and local agencies and interested members of the public on June 27, 1975. . . .

f. In the course of its consideration of the OCS oil and gas lease sale proposal in the Northern Gulf of Alaska, the Department involved the State of Alaska in the various procedures followed by the Department in considering that lease sale. State and local agencies and citizens groups were invited to designate experts to work with BLM's staff in the preparation of the draft EIS for the lease sale.

Findings of Fact by the District Court, J.A. at 44-45.

Public hearings were held on the draft site-specific EIS in Anchorage, Alaska. Government officials, environmental groups, and members of the public were invited to testify and to submit written comments on the draft EIS. Pursuant to this request, comments were received from a number of departments of the State of Alaska. *Id.* at 46. In its comments on the draft, EPA again stressed the lack of reliable information on the environmental hazards that would be encountered in the GOA, and urged that exploration and development in that region be delayed:

> In view of the substantial environmental risks of proceding at this time with the proposed sale, we strongly urge the Department to more actively consider delaying the proposed action while, at the same time pursuing the biological baseline studies and other studies which would provide a better information base for designing and implementing technology to mitigate the environmental hazards. *We believe the sale should be delayed at least until the biological baseline work is completed. . . .*[16]

Following the hearings and comment period, the Department revised the site-specific draft EIS in light of the comments received. J.A. at 46.

On November 18, 1975, the Bureau of Land Management (BLM) published a final EIS for the lease sale in the Northern Gulf of Alaska. In addition to the final EIS, BLM prepared a Program Decision Option Document (PDOD) for the lease sale, which discussed the major issues to be considered by the Secretary and identified the alternative courses of action that were avail-

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[16] EIS, Vol. III, at 98 (emphasis added). *See also id.* at 100-101.

The baseline studies referred to by EPA include, in particular, a major environmental research program undertaken in the GOA in mid-1974 by the National Oceanic and Atmospheric Administration (NOAA), in cooperation with BLM. This research program was described by CEQ as "[t]he principal vehicle for improved understanding of frontier OCS regions. . . ." J.A. at 241. The study was designed as a four-to-five year research effort. J.A. at 381. However, at the time the Secretary made his decision to proceed with Sale No. 39, there had been only one full year of field research. J.A. at 241. Accordingly, the data available from the program at that time were "quite limited." *Id.* CEQ indicated in January, 1976, that "the environmental/oceanographic data base for tract selection and operations regulation can be substantially improved by at least two more years of work under" the NOAA program. *Id.* Interior indicated in the EIS that "[a] delay of approximately ½ to 1½ years would allow for completion of all preoperational phases of the environmental studies program. . . . A delay of up to 4 years would allow for completion of the longer term or 'ecological relationship' studies." EIS, Vol. II, at 678.

able. The PDOD explained the advantages and disadvantages of several alternatives, which ranged from a lease sale of 1.8 million acres to more restricted lease sales to no sales at all. Id. at 47.

The final EIS for the lease sale makes note of EPA's recommendation that the sale be delayed,[17] and includes a brief discussion of the "alternative" of delaying the sale "pending completion of studies in the Northern Gulf of Alaska concerning the potential environmental impacts of offshore minerals development." [18] This final EIS was once again submitted to EPA, pursuant to § 309 of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-7. That provision requires the Administrator of EPA to "review and comment in writing on the environmental impact" of federal actions to which NEPA applies. If the Administrator should determine that a proposed action is environmentally "unsatisfactory," § 309(b) requires him to publish his determination and refer the matter to CEQ. On December 18, the Administrator informed the Secretary that EPA had

> concluded that the action as proposed and presently scheduled is unsatisfactory from the standpoint of environmental quality based on its potentially harmful effects to the environment and on the fact that potential operational and technical safeguards which might be utilized may not adequately protect the environment from hazards arising from this action.[19]

EPA again argued that the sale should be delayed in order to allow, *inter alia*, the completion of the environ-

[17] EIS, Vol. III, at 114.

[18] *Id.*, Vol. II, at 676-679. *See* Part II A(2) *infra*.

[19] J.A. at 184.

mental studies.[20] Accordingly, under the terms of § 309 (b), the Administrator referred the question of Sale No. 39 to CEQ.

Following this § 309 referral, the Council, Interior, EPA, and other interested agencies engaged in an "intensive review of the objections raised by Administrator Train. . . ." [21] Based on this review, CEQ informed the Secretary that it agreed with EPA that "it would be most desirable, from an environmental point of view, to delay the sale. . . ." [22] However, while CEQ urged the Secretary to "give careful consideration to that opinion," it also suggested an alternative, fallback position, in the event that the Secretary should decide that "a blanket delay of the sale is not in the national interest . . . ." [23] The Council acknowledged that it was the Secretary who had to make the "final decision" and who had to balance "the enviromental benefits" of delay against "the costs of postponing potential oil and gas production and revenues." [24] But, if after conducting such a balancing, the Secretary concluded that *some* sale was required immediately, CEQ "strongly urge[d] that the sale be limited to those tracts that, relative to other tracts in the original proposal, appear to represent the lowest possible degree of risk of environmental damage." [25] Specifically, CEQ

[20] *Id.* at 185-6.

[21] *Id.* at 233.

[22] *Id.* at 236. Other federal agencies also noted the need for additional research, and recommended delay. *See, e.g.*, EIS, Vol. III, at 61 (Coast Guard); J.A. at 211-13 (U.S. Department of Commerce, National Marine Fisheries Service); EIS, Vol. III, at 77 (U.S. Department of Commerce); J.A. at 407-08 (Marine Mammal Commission); *Id.* at 189 (U.S. Fish and Wildlife Service).

[23] J.A. at 236.

[24] *Id.*

[25] *Id.*

urged that any sale be restricted to "a contiguous block" of tracts "in the northeasternmost zone of the original sale proposal," comprising a total of some .15 million acres. This area, in CEQ's view, was both "highly promising in oil and gas potential and relatively low in vulnerability to environmental damage." [26]

The Secretary's staff subsequently prepared a Status Report and Decision Paper on the CEQ recommendations, which served as a supplement to the PDOD. It contained both a discussion of the advantages and disadvantages of the CEQ recommendations and alternatives to them. J.A. at 48. Interior also prepared a third option paper called the Tract Selection Option Paper. This document supplemented the PDOD by posing additional options for tract offerings in the event the Secretary decided to proceed with the lease sale. The options included the recommendation of CEQ. *Id.*

Upon consideration of these materials and consultation with the CEQ, EPA, the National Oceanographic and Atmospheric Administration and the Federal Energy Administration, the Secretary concluded, on February 17, 1976, that sufficient information was available to identify and reduce environmental risks from exploration and production in the Sale No. 39 area, and thus decided to proceed with the sale.

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[26] *Id.* at 236-7. This "limited sale" option was first proposed to CEQ by EPA, in a letter dated January 19, 1976. *Id.* at 401. The Administrator of EPA informed the Chairman of CEQ that "[i]f in the national interest it becomes imperative to proceed with the sale this year, it is our view that such an action could *only* be made environmentally satisfactory" if the sale were limited to the .15 million acres described in CEQ's letter to Interior. *Id.* at 404 (emphasis added). CEQ's recommendations to Interior were also endorsed by Interior's own National OCS Advisory Board. *Id.* at 413.

On that date, the Secretary informed CEQ of his decision to proceed with the sale as scheduled. In response to the suggestions that the sale be delayed, the Secretary indicated that, in his "considered judgment,"

> delays of . . . [several years] in the lease sale would not gain us enough to be worth the cost in postponement of development of the resources. I am convinced that we already know what the major hazards are in oil and gas development of the Gulf of Alaska; further studies will refine that knowledge, but they are unlikely to change it fundamentally. I am further convinced that the operating orders, safety requirements, and lease stipulations developed by the Bureau of Land Management and the U.S. Geological Survey will reduce those hazards to levels which are acceptable.[27]

Although the Secretary indicated that he had decided to reduce the amount of acreage to be offered for leasing from the 1.8 million acres originally proposed to some 1.1 million acres, he rejected the CEQ suggestion of a sale restricted to .15 million acres of contiguous tracts in one limited area of the Gulf. The Secretary stated that the .7 million acres he had eliminated from the sale removed

> by far the most risky tracts . . . , that the remaining overall probability of damaging accidents is low, and that the potential value to the Nation of discoveries in this area is very high. If we are to make sizeable discoveries, we must make sizeable acreage available for exploration. Unwarranted risks should not be taken, and in my judgment the tracts I have included in the offering can all be developed with a favorable balance of benefits to risks.[28]

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[27] *Id.* at 699.

[28] *Id.* at 700.

On February 25, 1976, CEQ sent to the Secretary its final evaluation of the sale decision. The Council indicated that it was "greatly disappointed" with the Secretary's decision "to proceed with a sale of such magnitude and such wide dispersion of tracts." [29] Such a sale would, in its view, pose "unwarranted risks to the natural resources and environment of the northern Gulf of Alaska and to the communities bordering it;" [30] accordingly, the Council expressly affirmed EPA's determination, made pursuant to § 309 of the Clean Air Act, that the sale was "environmentally unsatisfactory." [31] The Council argued that Interior had "consistently failed to recognize the truly unique environmental conditions of the Gulf of Alaska," and it reiterated its view that "the information available simply does not justify" the Secretary's decision:

> [I]n our view, the OCS program for the Northern Gulf of Alaska has not progressed to the point where the information is adequate for making sound leasing decisions or conducting operations beyond the limited area we recommended and under the most tightly controlled conditions.[32]

On April 6, 1976, after receipt of new data, the Secretary withdrew an additional 92,000 acres from the sale area, by deleting all tracts west of Kayak Island, which had been identified by CEQ as an area of particular environmental concern.[33] The remaining 189 tracts, comprising approximately one million acres, were

[29] *Id.* at 413.

[30] *Id.* at 414.

[31] *Id. See* p. 10 *supra.*

[32] *Id.* at 414-415.

[33] *Id.* at 89.

offered for sale on April 13, 1976. Of these 189 tracts, only 81 received bids. The Secretary then rejected five of those 81 bids and accepted the remaining high bids for 76 tracts.[34] These tracts comprised approximately 410,000 acres. J.A. at 49.

II. The Issues

A. *The Alternative of Delay*

Appellants make two related arguments with respect to the Secretary's decision not to delay the sale. They argue, first, that the information available to the Secretary in April, 1976, was insufficient, as a matter of law, to permit a decision to proceed with the sale at that time. They argue, second, that even if this lack of information did not absolutely preclude a sale in April, 1976, the Secretary's response to the suggestions that the sale be delayed was inadequate; they contend, in other words, that the analysis in the EIS of the "alternative of delay" was insufficient, and that the Secretary failed to articulate (either in the EIS or elsewhere) the reasons that led him to reject the advice of EPA, CEQ, and others.

We dicuss each of these arguments in turn.

1.

The district court concluded that "[t]he information and the studies which were available to the Secretary were sufficient to permit the preparation of an EIS which meets the requirements of NEPA. . . ." Conclusion of Law No. 7, J.A. at 56. Appellants strenuously disagree. They argue that even though the EIS may have been based on the best information available as of the date of its preparation, under NEPA the "best available information" may not be good enough. They contend that

[34] *Id.* at 90.

NEPA imposes on agencies affirmative information-gathering obligations; and until those obligations have been satisfactorily carried out—until, that is, sufficient data has been amassed "to provide a factual basis for responsible impact prediction or mitigation," Appt.'s Br. at 31—NEPA imposes an absolute bar to proceeding with a given project. *Id.* at 31-2.

Appellants conceded, of course, that these information-gathering obligations, like an agency's other NEPA obligations, are necessarily bounded by a "rule of reason;" [35] but they contend that Interior's action here was clearly "unreasonable." They agree that agencies need not "wait forever to fathom the unfathomable, or arrive at definitive answers on questions far beyond the existing state of scientific or technological ability." Appt. Br. at 35. Where, however, the data deficiencies are substantial, and where the present level of scientific ability is adequate to cure those deficiencies within a reasonable period of time, appellants contend that those deficiencies *must* be rectified before the project may be allowed to proceed. Thus, in the present case, appellants argue that the Secretary really had no discretion to reject the suggestions of CEQ and others that the sale be delayed in order to allow further progress in the ongoing environmental research program. The data to be obtained from that additional research were, in appellants' view, an essential prerequisite to the Secretary's lease-sale decision.

As a preliminary matter, we note that NEPA does, unquestionably, impose on agencies an affirmative obligation to seek out information concerning the environmental consequences of proposed federal actions. Indeed, this is one of NEPA's most important functions. As this court

[35] Natural Resources Defense Council, Inc. (NRDC) v. Morton. 458 F. 2d 827, 837 (D.C. Cir. 1972).

has held, "the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known." *Scientists' Institute for Public Information, Inc., v. AEC* (*SIPI*), 481 F.2d 1079, 1092 (D.C.Cir. 1973). And prediction—or, at least, *informed* prediction—is only possible after an agency has conducted a thorough inquiry into all aspects of the contemplated project and the area to be affected.

Predictions, however, by their very nature, can never be perfect; and the information available to an agency could always be augmented. The question in each case is, "How much information is enough?" And that is not a question to which NEPA provides a clear, firm answer. Certainly, NEPA cannot be

> read as a requirement that *complete* information concerning the environmental impact of a project must be obtained before action may be taken. If we were to impose a requirement that an impact statement can never be prepared until *all* relevant environmental effects were known, it is doubtful that any project could ever be initiated.[36]

Some element of "speculation" is "implicit in NEPA." [37] And just as agencies may not be allowed "to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball

[36] Jicarilla Apache Tribe of Indians v. Morton, 471 F. 2d 1275, 1280 (9th Cir. 1973) (emphasis added). Some environmental impacts will always be unknown at the time a decision to proceed is made; indeed, "one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown." *SIPI, supra,* at 1092.

[37] *SIPI, supra,* at 1092.

inquiry,' " [38] so also agencies may not be precluded from proceeding with particular projects merely because the environmental effects of that project remain to some extent speculative. NEPA simply does not specify the quantum of information that must be in the hands of a decisionmaker before that decisionmaker may decide to proceed with a given project. Rather,

> NEPA was intended to ensure that decisions about federal actions would be made only after responsible decisionmakers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs.[39]

One of the costs that must be weighed by decisionmakers is the cost of uncertainty—*i.e.*, the costs of proceeding without more and better information. Where that cost *has* been considered, and where the responsible decisionmaker has decided that it is outweighed by the benefits of proceeding with the project without further delay, the courts may not substitute their judgment for that of the decisionmaker and insist that the project be delayed while more information is sought. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).[40]

We thus hold that the Secretary was not required, as a matter of law, to await the results of the ongoing

[38] *Id.*

[39] Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 512 (D.C.Cir. 1974).

[40] Nor are the environmental agencies empowered to substitute their judgment for that of the responsible agency official. As the CEQ noted in its letter of January 23, 1976, to the Secretary, urging that the sale be delayed, "[t]he Council recognizes, of course, that the final decision is yours and that you must decide whether the environmental benefits gained by such delay outweigh the costs of postponing potential oil and gas production and revenues." J.A. at 236.

studies before deciding to proceed with the lease sale. Even though the "alternative of delay" was vigorously advocated by CEQ, EPA, and others, it is the Secretary of the Interior who has been charged by Congress with the responsibility for deciding whether, and when, to lease portions of the OCS; in making those decisions, the Secretary *did* have the discretion to reject the advice that had been offered to him.

2.

While the Secretary was thus not required to *accept* the "alternative of delay," he was required to give full and careful consideration to that alternative prior to reaching his decision. Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), specifies that an EIS must contain a "detailed statement" of "alternatives to the proposed action." And § 102(2)(E) of the Act requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action. . . ." As noted *supra*, the final Sale No. 39 EIS does make note of EPA's recommendation that the sale be delayed, and includes a brief discussion of the "alternative of delay." [41] Appellants argue, however, that that discussion is insufficient to satisfy the requirements of NEPA.

As this court and others have frequently pointed out, NEPA requires agencies to engage in a "finely tuned and 'systematic' balancing analysis," in which the environmental costs of proposed projects are compared to and balanced against their economic and other benefits. *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1113 (D.C. Cir. 1971). The requirement that agencies prepare "detailed" environmental impact statements aids this broader purpose in several ways. First, the statement aids the agency's own decisionmaking

[41] See nn.17 & 18, *supra*.

process, by ensuring that the agency has before it "all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance." *Id.* at 1114. Moreover, the statement provides evidence that "the mandated decision making process has in fact taken place. . . ." *Id.* Finally, and most importantly, the statement makes it possible for "those removed from the initial process"—in other agencies, in Congress, and in the public—"to evaluate and balance the factors on their own." *Id.; NRDC v. Morton, supra,* at 833.

The "detailed statement" of "alternatives to the proposed action" called for by § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), has been aptly characterized as "the linchpin of the entire impact statement." *Monroe County Conservation Council, Inc. v. Volpe,* 472 F.2d 693, 697-8 (2d Cir. 1972); *NRDC v. Callaway,* 524 F.2d 79, 92-3 (2d Cir. 1975). This statement must not simply *list* possible alternatives; instead, it must contain a "detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives. . . ." *NRDC v. Callaway, supra* at 92; *NRDC v. Morton, supra* at 834. The CEQ's Guidelines on the Preparation of Environmental Impact Statements indicate that the statement should include a "rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions," including "the alternative of taking no action pending further study . . . ." 40 C.F.R. § 1500.8(4). The statement's analysis "should be sufficiently detailed to reveal the agency's comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative." *Id.* The discussion of alternatives "must go beyond mere assertions" if it is to fulfill its vital role of "exposing the reasoning and data of the agency proposing the action to scrutiny by the public and by other branches of the government." *Callaway, supra* at 93, 94; *Silva v. Lynn,* 482 F.2d 1282, 1286-7

(1st Cir. 1973). An agency may not, in other words, "keep[] its thought processes under wraps." *Ely v. Velde,* 451 F.2d 1130, (4th Cir. 1971).

The discussion of the "alternative of delay" in the Sale No. 39 EIS is brief—consisting of three pages out of 1700 in the final EIS. *See* EIS, Vol. II at 676-79. The statement discusses the benefits of delay in general terms.[42] It notes that "a delay of approximately ½ to 1½ years would allow for completion of all preoperational phases of the environmental studies program in the northern Gulf of Alaska . . . ." *Id.* at 678. And the statement concedes that "[t]he information obtained from the completion of these studies prior to holding the proposed sale would provide a greater degree of confidence than presently exists concerning the leasing of any given OCS area and the siting of offshore facilities, including pipelines, in relation to geologic, oceanographic, and biotic parameters." *Id.* However, the statement contains no information whatsoever as to the *costs* of such a delay.

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[42] Aside from the statement's reference to the "greater degree of confidence" that would result from delay, the only discussion of the benefits of delay is the following:

> Completion of the studies could provide the necessary information that could prompt deletion of a tract or tracts prior to holding the sale based on unacceptable potential environmental risk. Presently unknown impacts could be avoided or reduced, but until all studies are completed and analyzed, impacts can only be speculative.
>
> It is conceivable that information obtained from the environmental studies would provide a basis for the preparation of additional special stipulations and for the additional protection of environmental values prior to holding the proposed sale.

EIS, Vol. II, at 679. The discussion of the alternative of delay makes no reference to the vigorous advocacy of this alternative by EPA, the State of Alaska, and others.

NEPA's requirement that an agency discuss "alternatives to the proposed action" is subject to a "rule of reason," [43] and that rule of reason necessarily governs both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them. Here the EIS does not even avert to the costs of delay in terms of lost oil production opportunities, and makes no attempt to quantify the benefits to be expected from delay. Nor can quantitative estimates of the costs and benefits of delay be found in any of the documents prepared by DOI after publication of the final EIS, including the Secretary's letter of February 17, 1976 to the Chairman of the CEQ, informing him of the decision to proceed with the sale as scheduled."

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[43] *See* n. 35 supra.

" *See* p. 13 *supra.*

The Secretary's duty to consider the alternative of delay is underlined by the EPA/CEQ determinations, made pursuant to § 309 of the Clean Air Act, that the sale was "environmentally unsatisfactory." *See* nn. 19 & 31 and accompanying text *supra.* As we have noted, these determinations did not *bar* Interior from proceeding with the sale; but they did give rise to a heightened obligation on Interior's part to explain clearly and in detail its reasons for proceeding. It seems clear to us that § 309 was intended to do something more than merely reiterate § 102(2)(C) of NEPA, which itself requires the *transmittal* of impact statements to CEQ. The Senate Report on § 309 notes that NEPA permits CEQ *review* of environmental impact statements, but suggests that mere review may not be enough:

> [NEPA] does not assure that Federal Environmental agencies will effectively participate in the decisionmaking process. It is essential that mission-oriented Federal agencies have access to environmental expertise in order to give adequate consideration to environmental factors.

S.REP. No. 1196, 91st Cong., 2d Sess. 43 (1970). It was evidently Congress' intention, in enacting § 309, to make the environmental agencies more "effective participants" in the decisionmaking process, and to assure more "adequate consid-

The question is, was it reasonable to proceed without quantitative estimates? [45] Appellants do not indicate how the Secretary could have made a quantitative estimate of benefits to be expected from delay. We can assume for discussion that the Interior Department had data that would permit some quantitative estimate of crude oil that might be available from the lease sites, and the time frame of delivery. There still remains the question whether and to what extent NEPA requires, in these circumstances, something in the nature of a quantitative cost-benefit analysis. Often such analyses are misleading, since the difficulty of assigning quantitative values to environmental considerations tends to minimize their sig-

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eration" of their views by the "mission-oriented Federal agencies." We believe that this requires, at a minimum, that where the environmental agencies have concluded that a particular project is "environmentally unsatisfactory," and where a "mission-oriented" agency has nonetheless decided to proceed with the project, it must articulate clearly its reasons for doing so. In light of our conclusion that it would be anomalous to set aside the lease sale at this late date, we find it unnecessary to determine with further precision the nature of the added burden imposed on the agency by § 309.

[45] Speaking only for himself, the writer of this opinion believes that the court should also consider whether the Secretary's balancing was sufficiently particularized—whether he was required to weigh *these* energy resources against the unusually grave environmental risks of *this* particular sale. Although "the energy shortage is practically a matter capable of judicial notice," Govt. Br. at 56 n.29, this does not mean that the mere invocation of the energy shortage necessarily constitutes a sufficient explanation for every policy decision that will in any way alleviate that shortage. The "energy shortage" is unhelpful as an explanation because it proves far too much—it would also justify (or fail to justify) a sale larger, earlier, or less regulated than the sale at issue here. This kind of "explanation" may preclude intelligent evaluation of the Secretary's decision by those outside the agency—and it was precisely that kind of evaluation that NEPA was intended to facilitate.

nificance. In the last analysis the decisionmaker is left with a comparison of non-commensurable entities—damage to the environment versus added energy resources. We recognize that it is a central purpose of NEPA to compel an agency to make such comparisons. Yet the agency retains, under NEPA, reasonable discretion to decide when it has sufficient information to choose intelligently between alternative courses of action that affect the environment. The Secretary's letter to the chairman of CEQ stated that this was an "especially difficult instance of the problem of balancing two of the Nation's highest priorities, energy supply and environmental protection" but that he had become convinced "that on balance it is in the National interest to move ahead with the lease sale." [46]

For the present, we find it unnecessary to decide whether the Secretary's rejection of the alternative of delay represents a reasonable exercise of this discretion. The period of delay originally recommended by EPA and CEQ has by now very nearly elapsed. It would obviously be somewhat anomalous to set the sale aside now, so that the Secretary could reconsider whether, in early 1976, he should have postponed a sale decision until mid-1977. More importantly, however, although the Secretary decided not to delay a sale decision pending the results of the studies in the Gulf, those studies have been continuing. Accordingly, most, if not all, the data that CEQ considered necessary for the initial sale decision have by now presumably been gathered; and these data will obviously be available to the Secretary when he considers, on remand, whether to change the operating orders.

[46] *See* J.A. at 698 *et seq.* In addition to this letter and the EIS, the Secretary also apparently had before him at the time he made the decision to proceed a so-called Program Decision Option Document (PDOD) prepared by BLM, and a "Status Report and Decision Paper" on CEQ's suggestions prepared by the Secretary's own staff. Govt. Br. at 10-12, 55. The PDOD's discussion of the option of delay simply repeats, virtually verbatim, the discussion of that subject in the EIS. *See* J.A. at 518-519. The "Status Report and Decision Paper," J.A. at 450-51, is somewhat more helpful, but there is absolutely no indication in the record that the Secretary's decision to proceed with the sale was, in fact, premised on this staff analysis of the "costs of delay."

B. *The Operating Orders*

The OCS Lands Act, 43 U.S.C. § 1331 et seq., grants to the Secretary of the Interior broad responsibility for administering an oil and gas leasing program on the OCS. That responsibility has in turn been divided between two subdivisions of the Interior Department (subject, of course, to the Secretary's ultimate supervisory authority). The Bureau of Land Management is charged with the primary responsibility for administering the actual leasing of particular tracts. *See* 43 C.F.R. § 3300 *et seq.; see also* Affidavit of Stanley Doremus, Deputy Assistant Secretary of the Interior for Program Development and Budget (Doremus Affidavit), J.A. at 649-650. It is thus BLM that conducted Lease Sale No. 39, and that authored the EIS challeged here. On the other hand, the United States Geological Survey (USGS) has the primary responsibility for supervising and regulating the lessees' operations on the leased tracts. *See* 30 C.F.R. § 250.1 *et seq.* and EIS, Vol. II, at 553; *see also* EIS, Vol. III, at 164. In carrying out this supervisory authority, USGS both enforces the operating regulations set forth at 30 C.F.R. § 250.1 *et seq.*, and promulgates detailed "operating orders" (hereinafter, Orders) for each region in which drilling operations are contemplated. These Orders govern the manner in which exploration and development may be carried out, and specify, *inter alia*, the safety and environmental standards that lessees will be required to meet. *See* 30 C.F.R. §§ 250.2(j);

250.11; 250.12(a). USGS published draft Orders for the Gulf of Alaska on January 6, 1975;[47] these Orders were adopted, with some revisions, effective March 1, 1976.[48]

The draft Orders are attached as an appendix to the EIS published November 18, 1975. The contents of the Orders is described briefly in a section of the EIS entitled "Mitigating Measures Included in the Proposed Action."[49] Appellants argue that more was required. They note that decisions regarding *how* OCS operations are to be conducted, which are incorporated in the Orders, may be at least as significant as decisions regarding *whether* to allow OCS development at all in a particular region. Appellants' Br. at 10. Accordingly, they contend that Interior was required to prepare a "detailed" evaluation of the environmental impact of the Orders, either in a separate EIS focusing on the Orders themselves, or as a part of the Sale No. 39 EIS. In particular, they argue that Interior was required to evaluate *alternatives* to those Orders that were actually adopted.

As a preliminary matter, we agree with the district court that the Secretary was not required to prepare a *separate* EIS on the Orders, and that "[i]t was within the discretion of the Secretary to consider the OCS Orders within the context of the EIS for Sale No. 39."[50] While the Orders may have considerable impact on the environment, that impact can arise only after a lease sale has been held and drilling operations have commenced under

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[47] 40 Fed. Reg. 1086 (1975), *reprinted* at EIS, Vol. III, Appendix 2.

[48] 41 Fed. Reg. 10105 (1976), *reprinted* in J.A. at 216 *et seq.*

[49] EIS, Vol. II, at 552 *et seq.*

[50] Conclusion of Law 8, J.A. at 56.

the terms of the Orders. The promulgation of the Orders cannot, by itself, affect the environment in any way. *Cf. NRDC v. NRC*, 547 F.2d 633, 653 n.57 (D.C.Cir. 1976), *cert. granted sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC*, 429 U.S. 1090 (1977). The Secretary was, of course, free to prepare a separate EIS on the Orders; and such a course might well have been desirable, since the Orders do extend to a much broader geographical area than any individual lease sale. Nonetheless, we cannot say that his decision to defer consideration of the impact of the Orders until a particular sale was contemplated was unreasonable.

While the Secretary could thus consider the impact of the Orders within the context of the Sale No. 39 EIS, the more important issue is whether the "consideration" given to the Orders in that EIS was adequate. We conclude that it was not. As noted *supra*, the EIS merely describes the Orders that had been proposed and adopted; there is no attempt to evaluate the environmental impact of those orders, as opposed to other Orders that might have been adopted. In essence, the EIS simply treats the Orders as a given—*i.e.*, the environmental impact of the lease sale is evaluated on the assumption that any exploration and development in the sale area will be conducted in accordance with those particular orders.[51]

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[51] Indeed, when appellants suggested, in their comments on the draft EIS, that a fuller evaluation of the Orders was required, BLM responded by simply disclaiming any responsibility for the Orders or for evaluating them:

> It is not the responsibility of BLM to establish operating requirements or to supervise OCS operations. The State of Alaska has reviewed the proposed OCS orders for the Gulf of Alaska published January 6, 1975, and submitted comments. These comments were considered in preparing the Gulf of Alaska Orders which will be issued shortly.

The Secretary argues that a fuller evaluation of the Orders, and of possible alternative orders, was not required, because "these orders are nothing more than methods of mitigating potential adverse environmental impacts and promoting safety . . . ." Govt. Br. at 47.[52]

Further comments on operating practices should be submitted at that time.

EIS, Vol. III, at 164. The Department of the Interior has overall responsibility both for deciding whether to lease a particular area, and for regulating the manner in which the lessees' operations are conducted. The fact that Interior has chosen to bifurcate that authority between two of its subdivisions obviously cannot affect in any way its responsibility to evaluate fully the environmental impacts of a lease sale.

[52] The Secretary also argues that the Orders need not be analyzed in an EIS because "they are subject to change and retroactive incorporation into prior leases whenever USGS determines that more stringent standards may be achieved. . . ." Govt. Br. at 47. While this observation is correct, *see* Doremus affidavit, J.A. at 660, we fail to see how the fact that the Orders may someday be changed affects Interior's obligation to analyze their present environmental impact. Obviously, even a short-lived project may constitute a "major Federal action significantly affecting the quality of the human environment. . . ." 42 U.S.C. § 4332(C). Indeed, one of the items that must be included in the "detailed statement" on a "major Federal action" is an analysis of "any irreversible and irretrievable commitments of resources which would be involved in the proposed action. . . ." 42 U.S.C. § 4332(C)(v). The clear implication is that the "action" itself need not be "irreversible" in order to require the preparation of an EIS. It is certainly possible that any operations conducted pursuant to the Orders as presently written could entail "irreversible and irretrievable commitments of resources," even if the Orders were later to be amended.

The Intervenors suggest that it "just wouldn't make sense" to require an analysis of the Orders now, since additional analyses might then be required whenever the Orders were amended. Interv. Br. at 58. However, minor modifications of the Orders would presumably not constitute a "major Federal action," and would therefore not require the preparation of a new or updated EIS; and if USGS were to propose a significant amendment of the Orders, we would see nothing "senseless" in a requirement that additional environmental analyses be performed.

This description of the Orders raises the question of whether or in what circumstances NEPA applies to agency action that has a beneficial effect on the environment.

We find it unnecessary to address this broad issue on the facts before us. The Operating Orders in the case at bar present a far narrower question. They are not bestowed by the Secretary of the Interior out of sheer beneficence toward the environment. Rather, they represent a central mechanism by which the Secretary carries out his undertaking to keep to a minimum the adverce impact of the lease sale upon the environment. Specifically, the Secretary's decision to proceed with the lease sale without delay was based on the *premise* of protective operating orders. This is set forth in the critical letter of the Secretary to the Chairman of CEQ, dated February 17, 1976, advising of his decision to proceed with the sale. He stated his reasons as follows:

> The first question we have faced is whether the sale of leases in the Gulf of Alaska should be held now or should be delayed for further study and preparation.
>
> We believe that our information on geologic hazards is already sufficient for holding the sale; the U.S. Geological Survey advises me that it has completed analysis of both public and proprietary geophysical data on such hazards, and is professionally satisfied that it now has sufficient knowledge to make recommendations on tracts which should or should not be included. Moreover, in the course of the last few

weeks, working in consultation with the Environmental Protection Agency, we have progressed substantially in our drafting of operating orders for the Gulf of Alaska, and we will shortly issue in final form those orders which affect exploratory activity undertaken immediately after leasing.

On the other hand, I must substantially agree with your estimates of the length of the delay that would be necessary to improve significantly our knowledge and readiness in other areas. It will be several years before further biological and oceanographic studies will yield most of their results; and it may be that long or longer before the State of Alaska will accomplish the major legislative and planning steps which it would prefer to have complete before leasing.

It is my considered judgment, based on all these factors, that delays of such length in the lease sale would not gain us enough to be worth the cost in postponement of development of the resources. I am convinced that we already know what the major hazards are in oil and gas development of the Gulf of Alaska; further studies will refine that knowledge but they are unlikely to change it fundamentally. I am further convinced that the operating orders, safety requirements, and lease stipulations developed by the Bureau of Land Management and the U.S. Geological Survey will reduce those hazards to levels which are acceptable.

J.A. at 698-99.

In this context, agency action that might otherwise be viewed as "merely" beneficial to the environment takes on a new cast. When forthcoming operating orders are expressly viewed by the Secretary as part of the basic premise for the kind of consideration of adverse environmental impact that is mandated by NEPA, then the completion of the undertaking—issuance of protective operating orders—must be conducted with full consideration of environmental consequences and alternatives.

It would not be meaningful to consider at length, at the present time, what kind of discussion of environmental impact of operating orders and alternatives should have been considered either in the EIS for Sale No. 39, or at a subsequent time prior to the sale. The Secretary provided no discussion whatever in the EIS. Yet the district court found that the Secretary, in deciding on February 17, 1976, to proceed with the sale, not only reduced the size of the sale area by forty percent, but "revised the OCS Operating Orders to incorporate in substantial measure the recommendations made by CEQ and EPA. . . ." J.A. at 48. In any case, we must now be concerned with the present, and at the present time there is presumably more information that should be taken into account in any discussion of the environmental impact of the operating orders.

As we have noted, *supra*, an agency's responsibility to evaluate alternatives to a proposed action is governed by a "rule of reason." In this case, that "rule of reason" would require, at a minimum, an evaluation of any reasonable alternative orders put forward by those commenting upon Interior's own proposed orders. However, the "primary responsibility" for carrying out NEPA's mandate rests with the relevant agency, which may not simply "sit back, like an umpire, and resolve adversary contentions" presented to it. *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1119 (D.C.Cir. 1971). *See also Aeschliman v. NRC*, 547 F.2d 622, 627 (D.C. Cir. 1976), *cert. granted sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC*, 429 U.S. 1090 (1977). Accordingly, an analysis limited to the precise orders suggested to Interior might not necessarily fulfill its NEPA responsibilities. The nature and form of environmental analysis required in any given case are matters

left to the discretion of the agency involved,[53] and we will therefore not attempt to prescribe how Interior should, on remand, conduct its analysis of the impact of the Orders. We note, however, that one option open to Interior would be to analyze the impact of a *range* of operating orders—it could, in other words, compare each of the Orders promulgated by USGS to relatively more strict and relatively less strict Orders. But whatever the form of the analysis chosen by Interior, the goal must be to provide all those reading the statement with "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." *NRDC v. Morton*, *supra* at 836. *See also Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1136 (5th Cir. 1974).

C. *Termination Clauses*

Appellants argue that the environmental hazards and uncertainties of drilling in the Gulf of Alaska could have been substantially mitigated by the inclusion of "termination clauses" in the leases sold by Interior. As described by the appellants, such clauses would provide that the Secretary could terminate a lease if environmental hazards, unknown or unforeseen at the time of leasing, subsequently arose or were discovered. Appellants contend that the possibility of including such termination clauses in the leases constitutes an "alternative to the proposed action" that should have been considered by the Secretary and evaluated in the EIS. The Secretary contends, however, that he lacks the statutory authority to include such clauses in OCS leases, and he therefore concludes that "termination clauses" do not constitute the kind of "alternative" he was obligated to consider.

[53] *See, e.g.*, Jones v. District of Columbia Redevelopment Land Agency, *supra* at 510; *SIPI*, *supra* at 1092.

The Secretary argues that, under the OCS Lands Act, leases may be cancelled *only* where the lessee has been guilty of some wrongdoing—*i.e.*, where the lessee has done (or failed to do) something in violation of the lease's terms, of regulations in effect at the time of the lease's issuance, or of the Act itself. In his view, a termination clause would therefore violate the Act, since it would condition cancellation not on any wrongdoing by the lessee, but rather on the occurrence of some event wholly outside the control of the lessee, namely the discovery of a previously unforeseen environmental hazard. The Secretary bases his interpretation primarily on two specific provisions of the Act. The Act provides that the "issuance and continuance in effect of any lease . . . shall be conditioned upon compliance with the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease . . . ." 43 U.S.C. § 1334(a)(2); and the Act further provides that a lease may be cancelled whenever the lease owner "fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease . . . ." 43 U.S.C. § 1334(b)(1), (2). In the Secretary's view, this cancellation provision was intended by Congress to provide the exclusive means by which a lease might be cancelled.

In our view, this interpretation is inconsistent with other specific provisions of the Act, and with the evident Congressional intent to grant to the Secretary broad discretion in the administration of the OCS leasing program.[54] In charging the Secretary with the administra-

[54] An agency's interpretation of a statute it is charged with administering is normally entitled to deference from the courts. Train v. NRDC, 421 U.S. 60, 87 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965). Such deference is particularly due when the statutory interpretation at issue "involves

a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman, supra* at 16 (citation omitted). The government argues in its brief that the Secretary has consistently interpreted the Act, since its passage in 1953, to bar the inclusion of "termination clauses" in OCS leases. Govt. Br. at 52. There is, however, no evidence in the record to support this assertion. The only evidence in the record of the Secretary's "long-established position on lease termination," Govt. Br. at 50, n.25, is an affidavit prepared for this litigation by Stanley Doremus, former Deputy Assistant Secretary of the Interior for Program Development and Budget. J.A. at 703-707. This affidavit is conclusory in tone, and does not even assert that the statutory interpretation in question is "long-established" or dates back to the passage of the Act. While Mr. Doremus states that Interior Department officials have "administered and supervised the OCS leasing program on the understanding that the Secretary . . . does not possess the legal power to terminate such leases," *id.* at 705, he does not explain when, how, or in what context that "understanding" arose. Moreover, as the passage just cited demonstrates, Mr. Doremus consistently blurs the line between two legally distinct questions of statutory authority—*i.e.*, 1) whether the Secretary has the authority to include a termination clause in the OCS leases he offers for sale, and 2) whether he has the much broader authority to cancel a lease even if it does not contain such a clause.

Typically, of course, an agency's statutory interpretation may simply be inferred from the action the agency has taken. *See, e.g.*, Train v. NRDC, *supra*, and Udall v. Tallman, *supra*. Here, however, where the issue is the agency's inchoate, discretionary authority, our task is not so simple—the fact that the agency has chosen not to exercise that authority does not constitute evidence either of a lack of such authority, or even of a "long-established position" that the authority is lacking. *Cf. FTC* v. *Dean Foods Co.*, 384 U.S. 597, 610 (1966); *National Petroleum Refiners Ass'n.* v. *FTC*, 482 F.2d 672, 696 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Accordingly, where the only evidence of an agency's statutory interpretation is contained in an ambiguous litigation affidavit, prepared some twenty-three years after the enactment of the relevant statute, we conclude that that interpretation is entitled to no special deference.

tion of the leasing program, the Act gives him "very broad authority, with few guidelines." [55] The Act provides that

[55] H. REP. No. 1084, 94th Cong., 2d Sess. 86 (1976). This Report, prepared by the House's Ad Hoc Select Committee on the OCS, accompanied the proposed OCS Lands Act Amendments of 1976, which would have substantially revised the 1953 Act. As the Report makes clear, it was precisely because of the breadth of the Secretary's discretion under the 1953 Act that the Committee wished to amend the Act. The Report describes the 1953 Act as

> an all too general piece of legislation containing few mandates for the Secretary of the Interior in carrying out his important responsibilities in leasing OCS oil and gas resources. Much of the recent criticism leveled at the Act is based on its lack of specificity.

Id. at 50. In a section of the report discussing the "need" for the amendments, the Committee specifically referred to President Nixon's 1974 directive to accelerate leasing on the OCS, see n. 2 *supra*, and noted that this proposal had

> crystallized growing concern on the part of many in Congress and elsewhere about the open-ended authority in the 23-year-old legislation. The existing law gives little guidance to the Secretary of the Interior on how he is to go about leasing OCS lands.

Id. at 73-4.

Section 204 of the proposed Act would have empowered the Secretary to "cancel[] . . . any lease . . . , at any time, when it is determined, after hearing, that continued activity pursuant to such lease would cause serious harm or damage" to the environment. The Secretary argues that this proposed amendment "underscores the correctness" of his interpretation of the 1953 Act, since "it demonstrates congressional awareness of the gap in the Secretary's existing authority [with respect to termination clauses]." Govt. Br. at 54. In our view, however, the fact that Congress considered *requir-*

> [t]he Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf. . . . Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil

ing OCS leases to be cancellable in no way indicates that the Secretary now lacks the *discretion* to make them cancellable by the inclusion of termination clauses. On the contrary, as we have indicated *supra*, the Committee's goal, in proposing the amendments to the 1953 Act, was to replace the Secretary's broad, largely unregulated discretion with more specific guidelines. Thus, in the Report's comments on § 204 of the proposed Act, the Committee notes that it would amend "Section 5 of the Outer Continental Shelf Lands Act of 1953 by providing *detailed requirements* for the administration of leasing on the OCS." *Id.* at 86 (emphasis added). The Report noted further that

> [t]he original subsection (a) of subsection 5 of the OCS Act [43 U.S.C. § 1334(a), quoted in text, *infra*] granted very broad authority, with few guidelines, to the Secretary to promulgate regulations. The amended subsection, while not limiting the generality of the power granted to the Secretary to promulgate any appropriate regulation, does provide *statutory guidelines and requirements* for certain types of regulations.

Id. at 86-7 (emphasis added).

> or gas in any of said submerged lands, and drilling or other easements necessary for operations or production.

43 U.S.C. § 1334(a)(1). Moreover, the Act specifically provides that leases "shall . . . contain such rental provisions and such other terms and provisions as the Secretary may prescribe at the time of offering the area for lease." 43 U.S.C. § 1337(b)(4).

On its face, this latter provision would clearly seem to grant the Secretary the discretion to include termination clauses in OCS leases, if he wishes to do so; and we find nothing in the Act's legislative history to support a contrary reading. The legislative history contains virtually no discussion of the two provisions upon which the Secretary relies.[56] There is certainly no indication that Congress intended the cancellation provision set forth at 43 U.S.C. § 1334(b)(1), (2), *supra*, to be the exclusive means by which leases might be cancelled. In the absence of any such indication, we believe that the commonsense reading of these provisions is the correct one—*i.e.*, in specifying that the "continuance in effect of any lease . . . *shall* be conditioned upon compliance with" the applicable regulations, 43 U.S.C. § 1334(a)(2) (emphasis added), Congress indicated only that leases *must* be cancellable where the lessee has been guilty of some wrongdoing;[57] but Congress did not thereby indicate that the Secretary

[56] *See* H. REP. No. 413, 83d Cong., 1st Sess. (1953); *see also* S. REP. No. 411, 83d Cong., 1st Sess. (1953).

[57] The original Senate version of the Act had provided only that "[t]he continuance in effect of any lease . . . *may* be conditioned upon compliance with the regulations prescribed by the Secretary under the provisions of this section." *S.Rep. No.* 411, supra n.56 at 24 (emphasis added). The Committee indicated that it had adopted the present mandatory phrasing of this sentence in order to "be[] more specific" and to "creat[e] legislative standards." *Id.*

and the lessees are precluded from contracting to make the leases cancellable for other reasons as well.[58]

Insofar as we are aware, no other court has addressed the particular question of statutory authority at issue here. However, our statutory interpretation is fully consistent with the limited caselaw dealing with related issues. In *Boesche v. Udall*, 373 U.S. 472 (1963), the Supreme Court considered whether the cancellation provision of the Mineral Leasing Act, 30 U.S.C. § 188—which is very similar to the cancellation provision of the OCS Lands Act upon which the Secretary here relies[59]—

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[58] The Intervenors argue that another provision of the Act, 43 U.S.C. § 1337(b), would also preclude the Secretary from inserting termination clauses in OCS leases. That section provides in pertinent part:

> An oil and gas lease issued by the Secretary pursuant to the Section shall . . . (2) be for a period of five years and as long thereafter as oil and gas may be produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon . . . .

The Intervenors contend that a termination clause, which would create the *possibility* that a particular OCS lease might have a duration of less than five years, would be inconsistent with this provision of the Act. We disagree. There is nothing inconsistent about a lease having both a fixed duration and a provision permitting the reduction of that duration in the event of changed conditions. Similarly, of course, where operations on a lease have been suspended, pursuant to § 1334(a)(1) of the Act, the lease term may be *extended* for a comparable period, even though this results in a lease with a duration of *more* than five years. *See* Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973).

[59] 30 U.S.C. § 188(a) provides that

> [A]ny lease issued under the provisions of this chapter may be forefeited and canceled . . . whenever the lessee fails to comply with any of the provisions of this chapter,

provided the "exclusive source of the Secretary's power" to terminate a lease issued under the terms of that act. 373 U.S. at 475. The Court concluded that it did not. The specific question addressed in the *Boesche* case was whether the Secretary had the authority to cancel in an administrative proceeding a lease that had been granted in violation of the Mineral Leasing Act, even though there had been no wrongdoing on the part of the lessee. The Court noted that the Secretary of the Interior has been vested with "general managerial powers over the public lands," 373 U.S. at 476, and it held that these "general powers of management" gave him the authority to cancel a lease invalid at its inception, and that that authority had not been withdrawn by the Mineral Leasing Act. *Id.* at 478-9.

In reaching this conclusion, the Court pointed out that the Mineral Leasing Act "was intended to expand, not contract, the Secretary's control over the mineral lands of the United States . . . ," 373 U.S. at 481, and noted that it would be "surprising" to find in the Act a limitation on authority the Secretary already possessed (under his "general managerial powers") to cancel leases issued through administrative error. *Id.* The OCS Lands Act was aimed primarily at resolving questions of federal versus state control over the OCS; like the Mineral Leasing Act; it represented a substantial expansion of the Secretary's authority. Here, too, it would be "surprising" to find in the Act's cancellation provision a limitation on the Secretary's authority to prescribe the terms and conditions that should be included in each lease.[60]

> of the lease, or of the general regulations promulgated under this chapter and in force at the date of the lease . . . .

[60] *See also* 99 Cong. Rec. 10472 (1953). In response to the question whether it was "true that the primary responsibility for laying down the conditions for granting leases is to be in

To reiterate, we find only that the Secretary does have the authority, under the specific terms of the Act, as well as under his "general managerial powers over the public lands," to determine what clauses should be included in the OCS leases offered for sale; and *one* of the clauses he may, in his discretion, include in these leases is a "termination clause." We thus need not decide whether the Secretary, as part of his "general managerial powers," has the inherent authority to cancel an OCS lease (even if the lease does *not* contain a termination clause) if he should determine that the public interest requires such action because of the discovery of a previously unforeseen environmental hazard. We note, however, that the Ninth Circuit has concluded that the Secretary does *not* have this sort of inherent cancellation authority. *Union Oil Co. v. Morton*, 512 F. 2d 743 (9th Cir. 1975). That court held that "the Secretary . . . has no intrinsic powers of condemnation," *id.* at 750, and that such powers were not conferred "by implication" in the OCS Lands Act. *Id.* While the Secretary has the authority to *suspend* operations on a lease because of an environmental threat, *id.*, an "open-ended suspension", like a lease cancellation, would be equivalent to a "taking." *Id.* at 751. And the court concluded that such a "taking" was not within the Secretary's authority:

> Such a taking by interference with private property rights is within the constitutional power of Congress, subject to payment of compensation. But Congress no more impliedly authorized the Secretary to take the leasehold by prohibiting its beneficial use than by condemnation proceeding. A suspension for which

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the hands of the Secretary of the Interior, and is not to be delegated or farmed out to the respective State authorities?" Senator Cordon (the OCS Lands Act's sponsor in the Senate) replied: "The bill goes further than that . . . . Not only the primary power, but the absolute and complete power, rests in the Secretary. He is acting for the Federal Government."

> the fifth amendment would require compensation is therefore unauthorized and beyond the Secretary's power.

Id. (citation omitted).

The Secretary argues that the statutory construction he advances here is supported, and perhaps compelled, by *Union Oil*. We disagree. Obviously, the mere inclusion of a termination clause in a lease that is being offered for sale could in no way be considered a "taking," since no one is compelled to purchase the lease and to subscribe to its terms. More importantly, if a lease did include a termination clause, and if it were subsequently cancelled in accordance with the terms of that clause, no "taking" would have occurred. As the *Union Oil* court pointed out, "[a] lease may be terminated by its own terms in the event that stated conditions subsequent occur." *Id.* at 749. OCS leases are inherently risky investments; and since termination clauses could make such investments riskier still, potential lessees might well be unwilling to pay as much for leases with such clauses as they would pay for leases without them. Nonetheless, a lessee who has purchased a lease containing such a clause, and who has paid a reduced price for the lease precisely because it does contain such a clause, could hardly claim that his "property" had been "taken" if at some point in the future his lease were cancelled in accordance with the terms of the clause.[61]

Since we conclude that the Secretary *does* have the authority to include termination clauses in OCS leases, there can be little question that the possibility of including such clauses in the leases at issue here does con-

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[61] Compare the discussion in McBride & Wachtel, GOVERNMENT CONTRACTS § 30 (1976) of the government's "inherent" right to cancel contracts into which it has entered, and of the effect of termination clauses in such contracts.

stitute an "alternative to the proposed action" that should have been evaluated in the EIS and considered by the Secretary.[62] Termination clauses would mitigate the irrevocability of a decision to conduct a lease sale, and would thus reduce, at least to some extent, the risk of proceeding with a sale on the basis of incomplete environmental data. They would therefore have constituted a significant alternative to the options of simply proceeding with the sale or of delaying it pending the receipt of additional data.

We make this declaration in order to provide the declaratory relief requested by the complaint, which is appropriate in light of the omission we have identified. We do not, however, accord to appellants the further relief they have requested, namely, invalidation of the lease. We turn now to a discussion of appropriate relief.

III. RELIEF

Appellants urge that the Secretary's failure to comply fully with NEPA requires that the lease sale be set aside as invalid, and that any further drilling in the Gulf of Alaska be enjoined until compliance has been achieved. We conclude, however, that such relief is not required here.

Government leases issued in violation of the law *may*, in appropriate cases, be invalidated. *See, e.g., Cady v. Morton*, 527 F.2d 786, 798 (9th Cir. 1975); *Boesche v. Udall, supra*. And, as this court has noted, "[i]n most

[62] Even if the Secretary did lack the statutory authority to include termination clauses in OCS leases, he might still have been required to evaluate this alternative in the EIS. NRDC v. Morton, *supra* at 837. Indeed, since Congress was considering amendments to the OCS Lands Act at the time the EIS was published, *see* n.55 *supra*, such a discussion would unquestionably have proven helpful.

cases, . . . it is possible and reasonable for the courts to insist on strict compliance with NEPA, and actions can, consistently with the public interest, be enjoined until such compliance is forthcoming." *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 513 (D.C.Cir. 1974). However, while there is, in cases of NEPA noncompliance, a "presumption" in favor of injunctive relief,[63] such relief does not follow automatically from every finding of a violation of NEPA. Rather, where courts have enjoined ongoing projects, they have done so primarily to preserve for the relevant decisionmaker the full opportunity to choose among alternatives that is contemplated by NEPA. By maintaining the *status quo*, while additional environmental studies are performed, or additional alternatives are considered, an injunction ensures that there will be at least a "possibility" that the agency will "change its plans in ways of benefit to the environment. It is this possibility that courts should seek to preserve." *Jones v. District of Columbia Redevelopment Land Agency, supra* at 513; *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977). More generally, the purpose of equitable relief, in a NEPA case as in any other, is to *remedy* the particular violations that have taken place; accordingly, where an injunction is not required to preserve the decisionmaker's opportunity to choose, an ongoing project should obviously not be enjoined, especially where, as here, there are substantial public interests in the project's continuation. What is called for, in each case, is a "particularized analysis" of the violations that have occurred, of the possibilities for relief, and of any countervailing considerations of public interest. *Id.*

Thus, we begin our discussion of the appropriate relief in this case by focusing on the nature of the violations

[63] Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977).

we have found. We found that the Secretary had failed to consider certain alternatives to the proposed federal action—namely, the possibility of including termination clauses in OCS leases, and the possibility of conducting the lease sale pursuant to different, more rigorous operating orders than those promulgated by USGS. Both of these alternatives are only *partial* alternatives to the proposed action. That is, neither of these "alternatives" is, in fact, an alternative to the holding of a lease sale in the Gulf of Alaska OCS; rather, each constitutes a different, presumably less environmentally harmful means of conducting such a sale.[64]

Consequently, adding these two alternatives to the list of alternatives considered by the Secretary could not possibly have led him to reject altogether a lease sale in the Gulf of Alaska, because both of these alternatives expressly *contemplate* such a sale. At most, consideration of these alternatives might have led the Secretary to choose to conduct the sale somewhat differently—*i.e.*, with termination clauses in the leases, or pursuant to different operating orders. To the extent that the Secretary retains the flexibility to protect the environment that these alternatives would have provided, there is simply no need to set the sale aside.

As all parties concede, operating orders may be changed *after* a lease sale has been conducted and may be made effective retroactively upon existing lessees. *See* n.52 *supra*. Consequently, we see no need to set the sale aside while the Secretary conducts the required environmental evaluation of alternative orders; if, after conduct-

[64] The fact that these are only partial alternatives does not, of course, relieve the Secretary of the obligation to consider them or to include them in the EIS. NRDC v. Morton, *supra* at 836; Aeschliman v. NRC, *supra* at 629 n. 10. But it may affect the relief that is called for when, as here, the Secretary has failed to fulfill that obligation.

ing that evaluation, he concludes that the orders promulgated by USGS should be changed, he may change them. Any damage that may have resulted from the exploration that has already been conducted pursuant to the existing orders could not, in any event, be remedied by an injunction. Although continued operations pursuant to the existing orders might conceivably cause some environmental harm during the period in which the Secretary is conducting the necessary evaluation and is deciding whether to change the orders, that risk is simply too small and too speculative to justify the imposition of an injunction, as long as the Secretary proceeds reasonably expeditiously.[65]

Concerning the inclusion of termination clauses in the leases, the court concludes that it is neither necessary nor appropriate to require the Secretary to consider such an option at this time.[66] A decision to insert the termina-

[65] We note that, for the present, the operations in the Gulf of Alaska are limited to *exploratory* drilling; assuming that oil is discovered during the course of this exploration, it is estimated that large-scale *production* operations, with their correspondingly greater risk of environmental harm, will not commence until June, 1981. Peak oil production operations are not expected to take place before 1986-1987. Kleppe Affidavit, J.A. at 91-92.

We assume that the Secretary can complete the required evaluation and consideration of alternative operating orders prior to the commencement of production operations; if this assumption should prove to be inaccurate, appellants would, of course, be free to seek supplemental relief in the district court.

[66] Speaking only for himself, the writer of this opinion is of the view that the Secretary should consider the alternative of amending existing leases to include termination clauses. The possible practical drawbacks of this alternative—such as the difficulty of determining compensation and the possibility that some lessees would be deterred from further exploration—should not preclude us from requiring the Secretary to con-

tion clauses now would create grave legal tangles stemming from the impairment in the value of the leases that such modification would undoubtedly cause. Beyond the problem of determining appropriate compensation for this impairment, there is serious question whether the insertion of such clauses might deter some private contractors from pursuing this venture, with consequent injury to our energy resource mobilization. If it should eventually develop that the exploration would produce environmental damage that cannot be avoided by a modification of the operating orders,[67] or by a suspension of

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sider it. These are the types of factors the Secretary should take into account in determining whether to adopt an alternative, not reasons to foreclose such a consideration altogether.

Admittedly, the Secretary's authority to adopt this alternative is uncertain. *Cf.* Union Oil Co. v. Morton, *supra*, discussed at pp. 40-41 *supra*. Moreover, the question of the Secretary's authority to amend the leases in this manner was not addressed by the Secretary or by the parties in their briefs, and should not be decided by this court in the first instance, particularly when there is no guarantee that the Secretary would adopt this option. *Cf.* Collins Securities Corp. v. SEC, 562 F.2d 820, 827 (D.C. Cir. 1977); Nassar and Co. v. SEC, Nos. 76-1278 & 1536 (D.C. Cir., October 3, 1977) (cases remanded to the agency for initial resolution of questions of statutory interpretation). In any event, the Secretary should consider this alternative, whether or not he has the authority to adopt it. "The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch." NRDC v. Morton, *supra* at 837.

[67] As the Second Circuit has recently observed:

> [U]nder § 5(a)(1) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(1), the Secretary possesses full power to prescribe "such rules and regulations as may be necessary" to protect the environment from hazards

operations,[68] the government would, of course, retain the

> posed by exploitation of the continental shelf. Although a lease may be formally cancellable only for violation of pre-existing regulations, 43 U.S.C. § 1334(b), § 5(a)(1) provides that "The Secretary may at any time prescribe *and amend* such rules and regulations . . . and, *notwithstanding any other provisions herein*, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter" (emphasis supplied), ... [A] willful violation of subsequently-issued regulations would constitute a misdemeanor, 43 U.S.C. § 1334(a)(2), and could provide the basis for injunctive relief. A properly-adopted later regulation would have the force of law, the public interest in compliance would be persuasive in inducing the courts to grant relief, *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937), and the government's control over the seabed and its threatened resources by virtue of the OCS Lands Act, 43 U.S.C. § 1332(a), would give it standing to seek injunctive relief, see *United States v. Ray*, 423 F.2d 16, 22 (5th Cir. 1970).

County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1381-82 (2d Cir. 1977).

In *County of Suffolk* the court's opinion notes that "the Sale 40 leases provide that each lessee must in its OCS operations comply with the Secretary's regulations as they may be revised or supplemented to provide for prevention of waste, for conservation of the OCS and for protection or correlative rights therein." *Id.* at 1381. We do not readily identify the actual leases that were issued in the Alaska sale in the record before us and have not pursued the matter since it is not central to our opinion. The Second Circuit opinion also indicates that the subsequent regulations would have to be obeyed in any event since their violation would constitute a misdemeanor, 43 U.S.C. § 1334(a)(2).

[68] *See* County of Suffolk, *supra* at 1382; Union Oil Co., *supra* at 751-52; Gulf Oil Co. v. Morton, 493 F.2d 141, 144 (9th Cir. 1973). In referring to the possibility of suspension our intent is to take note of a possible authority without purporting to recognize it or define it. However, we do take

power to institute formal eminent domain proceedings at that time, to take the leasehold interests.

In conclusion, we (a) grant the declaratory relief set forth in section II C *supra*, and (b) remand to the district court, and direct that it remand the case to the Secretary for consideration of alternative operating orders as we have outlined above.

So ordered.

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note that in the *Union Oil* case the Ninth Circuit stated that if operations are suspended indefinitely, property rights have been taken, but that there was authority to promulgate a temporary suspension. The court said:

> A suspension whose termination was conditioned on the occurrence of events or the discovery of new knowledge which can be anticipated within a reasonable period of time would be a valid exercise of the Secretary's regulatory power, and not a fifth amendment taking.

512 F.2d at 752.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 76-1829

FILED FEBRUARY 24, 1978

STATE OF ALASKA, ET AL., *Appellants*

v.

CECIL D. ANDRUS, ET AL

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, LEVENTHAL and WILKEY, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed, in part, and certain declaratory relief is granted; and the remainder of the judgment of the District Court is vacated and the case is remanded to the District Court with instructions to remand the case to the Secretary for consideration of alternative operating orders, in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court
/s/ GEORGE A. FISHER
GEORGE A. FISHER
Clerk

Date: February 24, 1978

Opinion for the Court filed by Chief Judge Bazelon

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 76-1829

FILED APRIL 24, 1978

STATE OF ALASKA, ET AL, *Appellants*

v.

CECIL D. ANDRUS, ET AL.

BEFORE: BAZELON, LEVENTHAL and WILKEY, Circuit Judges

Order

Upon consideration of the petition for rehearing filed by appellees Western Oil and Gas Association, et al, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam

For the Court:
/s/ GEORGE A. FISHER
GEORGE A. FISHER
Clerk

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

STATE OF ALASKA, ET AL. v. THOMAS S. KLEPPE, ET AL., WESTERN OIL & GAS ASSOCIATION, *et al., Intervenor Defendants,* No. 76-0368, August 13, 1976.

Findings of Fact, Conclusions of Law and Judgment
Judgment

Waddy, J.

In this action plaintiffs seek a declaration that defendants violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, the Inter-governmental Cooperation Act, and various statutes designed to protect the nation's wildlife and environment, by holding an oil and gas lease sale, OCS Lease Sale No. 39, offering approximately one million acres of Outer Continental Shelf (OCS) lands in the Northern Gulf of Alaska. Plaintiffs initially sought a preliminary injunction to enjoin the defendants from holding OCS Sale No. 39 on April 13, 1976, as scheduled. They did not seek to block the sale altogether—only to delay it.

On April 8, 1976, this Court entered an Order denying plaintiffs' motion for a preliminary injunction. Plaintiffs appealed. On April 12, 1976, the motions panel of the United States Court of Appeals for the District of Columbia Circuit denied plaintiffs' motion to delay the lease sale pending a disposition of the appeal. The Lease Sale was held April 13, 1976, as scheduled. Plaintiffs subsequently withdrew their appeal.

Notwithstanding the fact that Lease Sale No. 39 was held on April 13, 1976, plaintiffs continued to press for a declaration as to the adequacy of the Environmental Impact Statement (EIS) prepared in connection with the Lease Sale.

On May 26, 1976, the parties submitted to this Court a joint motion seeking approval of trial procedures agreed to by the parties. This motion was granted by the Court on June 15, 1976, and an Order to that effect was entered on that date. Under the terms of the June 15 Order, the materials presented by the parties at the preliminary injunction were admitted into evidence. Additionally, the parties were to file trial briefs and further affidavits and exhibits to supplement the record. Briefs were filed and at a hearing on the merits on August 3, 1976, an Order was entered from the bench admitting into evidence the supplementary documents and materials filed by the parties.

On August 3, 1976, the Court, by stipulation of the parties, heard the cause on its merits without a jury. Upon consideration of that hearing together with the trial brief of the parties, and all affidavits, exhibits and documents submitted which were admitted into evidence by stipulation of the parties, the Court makes the following findings of fact and conclusions of law:

1. This lawsuit was brought by the State of Alaska, the City of Yakutat, the United Fishermen of Alaska, and the Cordova District Fisheries Union.

2. The federal defendants are Thomas S. Kleppe, Secretary of the Interior, and Curtis Berklund, Director, Bureau of Land Management, Department of the Interior, who are sued in their official capacities. Intervening as defendants in this proceeding are the Western Oil & Gas Association—a trade association—and eleven petroleum companies.

3. Plaintiffs primarily contend that the Environmental Impact Statement (EIS) prepared pursuant to the provisions of NEPA is insufficient to support the Secretary's decision to proceed with the lease sale on April 13, 1976; that the sale should have been delayed pending further environmental research and studies; that a specific

EIS should have been prepared for the OCS Operating Orders; that the leases offered by the Secretary should have contained a termination clause; and that the Secretary's decision to proceed with the lease sale on April 13, 1976, was, in view of the omissions and inadequacies, arbitrary and capricious.

4. Defendants contend that the EIS is sufficient to support the Secretary's decision including an adequate treatment of the operating orders, and that a separate EIS for the operating orders is not required; that the sale should not have been delayed; that the Secretary adequately weighed the costs and benefits; and that his decision to proceed with the sale on April 13, 1976, was not arbitrary and capricious.

5. The Secretary of the Interior scheduled OCS Lease Sale No. 39 pursuant to his authority under 43 U.S.C. § 1337 to grant oil and gas leases on the submerged lands of the outer Continental Shelf "[i]n order to meet the urgent need for exploration and development of the oil and gas deposits" contained thereon.

6. In making his decision to proceed with Lease Sale No. 39 the Secretary was required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, to consider the environmental ramifications of the sale and therefore, pursuant to 42 U.S.C. § 4332, had an environmental impact statement compiled.

Presale Activity

7. The Department of Interior (DOI) prepared an EIS pursuant to § 102(2)(C) of NEPA pertaining to Outer Continental Shelf Sale No. 39—Gulf of Alaska. The following steps were taken in the preparation of that EIS (*see* 1st Doremus Aff.):

a. On November 27, 1974, notice of a call for nominations of tracts suitable for oil and gas leasing in the

Northern Gulf of Alaska was published in the Federal Register, 39 F.R. 41387. The total area covered by the call was approximately 11.8 million acres.

b. In this same notice, Interior requested comments from all interested parties on possible oil and gas leasing in the general area of the call for nominations. Interior asked that such comments include, but need not be limited to, environmental, technical, and socio-economic aspects of potential oil and gas leasing and development in the area.

c. After receipt of numerous nominations and comments pursuant to this notice, the BLM Alaska OCS Office and the U. S. Geological Survey (USGS) field office prepared joint tentative tract recommendations.

d. On March 20, 1975, the Secretary publicly announced that certain identified tracts, totaling about 3.5 million acres, had been tentatively selected for further environmental study to be made in connection with the Department's ongoing consideration of a possible OCS lease sale offshore the Northern Gulf of Alaska in 1975.

e. Studies and analyses of potential oil and gas leasing and development of the proposed sale area were undertaken to provide an information base for a draft EIS. BLM's Alaska OCS Office then prepared a draft EIS for proposed lease sale No. 39, which was submitted to the Council on Environmental Quality (CEQ) and made available to federal, state, and local agencies and interested members of the public on June 27, 1975 (I EIS iv).

f. In the course of its consideration of the OCS oil and gas lease sale proposal in the Northern Gulf of Alaska, the Department involved the State of Alaska in the various procedures followed by the Department in considering that lease sale. State and local agencies and citizens groups were invited to designate experts to work with BLM's staff in the preparation of the draft EIS for the lease sale.

g. Public hearings were held on the draft EIS for Sale No. 39 in Anchorage, Alaska, on August 12-13, 1975. Federal state and local officials, environmental groups, industry and interested members of the public were invited to testify. In addition, the same parties were requested to submit written comments on the draft EIS during the 60-day comment period from June 27, 1975, to August 29, 1975. Pursuant to this request, comments were received from the following departments of the State of Alaska: Department of Law, Environmental Conservation, Fish and Game, Natural Resources, Community and Regional Affairs, Commerce and Economic Development, Highways, Revenue, Education and Public Works. Comments were also received from the Joint Federal-State Land Use Planning Commission. (III EIS 123-351).

h. Following the hearings, the Department proceeded to revise the site-specific draft EIS in light of comments received during the public hearings and all written comments submitted to the Department (*Id.* at 163-86, 218-37, 282-88, 306-16, 343-45, 350-51).

i. On November 17, 1975, BLM published a final EIS for the proposed OCS lease sale in the Northern Gulf of Alaska which was submitted to CEQ and made available to federal, state, and local agencies and interested members of the public. (40 F.R. 53413).

8. In addition to the final EIS, BLM prepared a Program Decision Option Document (PDOD) for Lease Sale No. 39 which discussed the major issues to be considered by the Secretary and identified the alternative courses of action that were available. The PDOD explained the advantages and disadvantages of several alternatives, which ranged from a lease sale of 1.8 million acres to more restricted lease sales to no sale at all. (1st Kleppe Aff., Ex. 1).

9. On December 18, 1975, the Administrator of the Environmental Protection Agency (EPA), pursuant to the EPA's responsibilities under Section 309 of the Clean Air Act, 42 U.S.C. 1857h-7, communicated to the Council on Environmental Quality (CEQ) a determination that the proposed Lease Sale No. 39 was unsatisfactory from the standpoint of environmental quality. EPA urged a delay in the offering of the leases pending: (1) preparation of adequate Operating Orders for the Gulf of Alaska, (2) further progress in State Coastal Zone planning, and (3) completion of environmental baseline and other special studies. Subsequently, the EPA stated that if it were imperative to proceed with the sale in 1976, the sale should be severely limited in acreage offered.

10. On December 22, 1975, the Chairman of CEQ requested a study in connection with the Section 309 referral to consider the objections raised by EPA. A one-month interagency study followed. The study group included the Department of the Interior, CEQ, EPA, the National Oceanographic and Atmospheric Administration (NOAA) and the Federal Energy Administration (FEA).

11. On January 23, 1976, following completion of the one-month study, the Chairman of CEQ recommended that the Secretary give careful consideration to a delay of the lease sale or alternatively to consider a lease sale offering of approximately .15 million acres.

12. The Secretary's staff subsequently prepared a Status Report and Decision Paper on the CEQ recommendations for Sale No. 39, which served as a supplement to the PDOD. It contained both a discussion of the CEQ recomemndations and alternatives to them. (1st Kleppe Aff., Ex. 1).

13. Interior also prepared a third option paper called the Tract Selection Option Paper. This document supplemented the PDOD by posing an additional five options for

tract offerings in the event the Secretary decided to proceed with Lease Sale No. 39. The options included the recommendation of CEQ as well as a discussion of each option and a map depicting each option. (*Id.* Ex. 1)

14. Upon consideration of the materials and consultation with the agencies identified above in paragraph 10, the Secretary on February 17, 1976, concluded that information then available to the Department was sufficient to identify and reduce environmental risks from exploration and production in the Sale No. 39 area, and thus decided to proceed with the sale. In so doing, however, he reduced the size of the sale area 40 percent to 1.1 million acres and implemented many of the EPA/CEQ recomendations concerning the sale to mitigate any adverse environmental impacts of the sale. Specifically, he revised the OCS Operating Orders to incorporate in substantial measure the recommendations made by CEQ and EPA; he imposed stipulations in Sale No. 39 leases to require leasees to provide state and local governments with information needed for onshore planning; and he imposed a two-year moratorium on further leasing in the area. (*Id.* Ex. 10)

15. On April 5, 1976, after receipt of new data concerning the migratory fowl rich Copper River Delta area, an additional 16 environmentally sensitive tracts comprising approximately 92,000 acres were deleted by the Secretary. (2d Kleppe Aff. ¶ 1). Thus, actually offered for sale, were 189 tracts covering 1.0 million acres.

The Sale and Post-Sale Activities

16. On April 13, 1976, Sale No. 39 took place as scheduled. Of the 189 tracts, comprising approximately one million acres, offered for sale at that time, only 81 received bids. The Secretary then rejected five of those 81 bids and accepted the remaining high bids for 76 tracts. These 76 tracts comprised approximately 410,000 acres and generated revenues of nearly $560 million. (2d Kleppe

Aff. ¶¶ 3-4). On June 1, 1976, leases on these 76 tracts were issued to 32 separate companies. (2d Kleppe Aff. ¶ 5 & Ex. Nos. 3-6).

The EIS

A. *Baseline Studies*

17. In 1974, BLM contracted for thirteen studies of the Gulf of Alaska sale area covering all major aspects of environmental concern. In mid-1975, at the end of the first year of laboratory and field research, reports were submitted to BLM containing the baseline data obtained during the initial 12 months of study. All thirteen first-year reports were available for use prior to the drafting of the EIS on the sale. Baseline research completed at the end of the first year, though, of course, not all-inclusive, was quite extensive and involved considerable effort. Nine research vessels were employed by the research teams on 13 different cruises conducted during all seasons of the year. A grid of 68 data-gathering stations was established for the performance of field experiments. In addition, four non-vessel field operations were conducted to obtain information on oil seeps, intertidal biology and marine mammal habits. Thousands of individual experiments and surveys were conducted and that data from this research effort were made available for use in the preparation of the EIS. (Monastero Aff. Ex. 6, pp. 17-25).

18. As an adjunct to these individual studies, literature searches of available scientific information were conducted on the proposed sale area. Two such literature searches were performed under contract by independent scientists and, in addition, BLM performed its own survey which was included in the final EIS on Sale No. 39. (Monastero Aff. ¶¶ 12, 13).

B. *Socio-Economic and Secondary Impacts*

19. The EIS describes at length the existing social and economic environment of the Northern Gulf of Alaska

coast, including such aspects as regional and local economics, human resources, land-use patterns, transportation systems, and recreation. I EIS 282-409. Next, the EIS contains predictions of social and economic impact of the proposed lease sale (II EIS 289-446). Changes in regional economics, population patterns, and cultural traditions are all assessed, as is the need for new facilities, such as housing, education, medical facilities and sewerage. Also discussed is the impact on both native and non-native communities.

C. *Impact of Oil Spills*

20. The EIS first discusses in general terms the probability of oil spills in the Northern Gulf of Alaska (II EIS 13-37) and then describes the effects of oil spills on various aspects of the environment, such as the terrestrial and marine biotic comunities, the ecosystem and food web, and endangered wildlife species. II EIS 84-288. Next, the EIS develops a matrix analysis for each block in the proposed lease area. From this analysis, predictions are made as to the potential for oil spills in each block, as well as evaluations of potential spills on the basis of their magnitude and persistence and the block's proximity to high-value resources, such as wildlife refuges, seabird colonies and fishing areas. II EIS 492-514.

D. *Alternatives*

21. With regard to the Northern Gulf of Alaska sale, all reasonable, viable and meaningful alternatives were considered in Volume II of the EIS, including the possibility of delaying the sale, cancelling the sale, as well as the availability of other energy proposed action beginning at page 642 and ending at page 736. Pages 642 to 669 discussed holding the sale in modified form including tract deletions and alternatives within the proposed action such as government exploratory drilling prior to leasing. Discussion of delay pending various developments was had

on page 669 to 683. And the alternative of withdrawing the sale and meeting energy needs from other sources was contained in pages 683 to 721. Also discussed were alternatives relating to different leasing areas in the United States, different areas in Alaska and holding a prototype sale. In addition to the alternatives discussed in the site-specific EIS dealing with the Northern Gulf of Alaska, a variety of alternatives are also discussed in the programmatic environmental impact statement for accelerated OCS leasing, which was published in 1975 prior to the Gulf of Alaska OCS sale.

E. *The OCS Operating Orders and Other Mitigating Measures*

When the Department opens a new region, such as the Gulf of Alaska, to OCS development, it promulgates for the region a comprehensive set of operational controls and equipment requirements for every phase of OCS exploration and development which are known as OCS Operating Orders. The EIS discuses the possible impacts which may ocur, sets forth the draft of the OCS Orders, and then sets forth the effect of the implementation of these orders on reducing possible adverse impacts. Appendix 2 of Volume III contains a complete copy of the proposed Gulf of Alaska OCS Orders. To the extent the final orders were modified after the publication of the EIS, they incorporated recommendations of EPA/CEQ which were designed to further mitigate adverse environmental impacts. Appendix 8 of Volume III is a 103-page description of "Oil and Gas Operations in the Northern Gulf of Alaska," containing numerous references to the USGS regulations and OCS Orders governing operations. Part III of the EIS (II EIS I-551) discusses the environmental impacts of oil and gas operations and related development in the lease sale area. Part IV of the EIS (II EIS 552-90) discusses the mitigating measures—including OCS Operating Orders—proposed for the Sale No. 39

area to reduce the type, occurrence, and extent of adverse impacts. Finally, Part V of the EIS (II EIS 591-630) discuses adverse environmental impacts which cannot be avoided even though the mitigating measures set forth in Section IV are implemented.

23. The OCS Orders have been the subject of public scrutiny. Drafts of these orders were submitted to CEQ/EPA and the State of Alaska and were published in the Federal Register, 40 F.R. 1086, Jan. 6, 1975, for comment by the public. The State submitted comments on the proposed orders in conjunction with comments submitted on the draft EIS. (2d Doremus Aff. ¶ 16).

24. Under OCS regulations and procedures both the exploratory and development plans of the lessees must be submited to and approved by Interior before the corresponding phases of the lease operation can begin. II EIS 553, III EIS App. 14, pp. 7-8. Furthermore, the EIS on Sale No. 39 states that approval of a lessee's development plan may require the preparation of a subsequent EIS specifically directed to the plan. II EIS 667.

The Lease

25. The Leases offered by the Secretary in OCS Sale No. 39 do not contain a termination clause. Plaintiffs argue that the Secretary should have taken the necessary steps to include such a clause in the leases which would allow their cancellation upon subsequent discovery of environmental hazards.

The Secretary's Decision

26. With respect to his responsibilities to enhance the Nation's energy supplies, the Secretary stated in an affidavit filed in this Court that domestic production of oil in the United States peaked in 1972 at 11.2 million barrels per day (BPD), declined to about 9.2 million BPD in 1973, to 8.8 milion BPD in 1974 and an estimated 8.5 mil-

lion BPD in 1975. Meanwhile, demand in 1975 was about 16 million BPD. The Secretary also stated that foreign oil imports have increased from about 20 percent of U. S. petroleum demand in 1970 to approximately 40 percent in 1975. He expected that demand could be as much as 24 million barels per day by 1980 and imports are anticipated to increase to 50 percent of this demand by that time. If exploration areas are not made available, imports could reach 70 percent of demand by 1990. (1st Kleppe, pp. 7-8).

CONCLUSIONS OF LAW

1. The Secretary of the Interior has authority under the Outer Continental Shelf Lands Act (OCS Lands Act), 43 U.S.C. 1331 *et seq.*, to lease OCS lands "in order to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged land of the Outer Continental Shelf . . . ." 43 U.S.C. 1337. In addition to this policy statement contained in the OCS Lands Act, there are numerous recent statements by Congress and the Executive concerning the need for OCS development to diminish this country's dependence upon imported oil. See, e.g., 15 U.S.C. § 751, 87 Stat. 627. Act of Nov. 23, 1973; Report of Committee on Conference on Coastal Zone Management Act Amendments of 1976, Report No. 94-1298, June 24, 1976, at p. 25; President Ford's energy message released on February 26, 1976; FEA 1976 *National Energy Outlook*, Executive Summary, pp. XXV, XXBIII.

2. The Secretary also has a responsibility under NEPA to consider environmental factors along with other considerations (economic, social, national security, energy) in the decision-making process and to balance the various factors. *Calvert Cliffs' Coordinating Comm.* v. *AEC*, 449 F.2d 1109 (C.A.D.C., 1971).

3. In holding Sale No. 39, the Secretary has performed this balancing to further the National policy of

increasing domestic energy supplies while at the same time being aware of and mitigating the possible adverse environmental consequences of his actions.

4. The Secretary's decision to hold Sale No. 39 was not arbitrary or capricious, nor did he abuse his descretion in so doing.

5. It is for the Secretary—not the courts—to balance the various competing public interests. Indeed, it is not appropriate for a court to substitute its judgment for that of the administrator. *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 410 U.S. 402, 415-16 (1971); *Calvert Cliffs Coordinating Comm.* v. *AEC*, 449 F.2d 1109 (C.A.D.C., 1971).

6. The EIS prepared for Sale No. 39 meets the requirements of NEPA in that it is an objective, good-faith document disclosing the known and unknown environmental impacts of a proposed project and reasonable and viable alternatives thereto.

7. The information and the studies which were available to the Secretary were sufficient to permit the preparation of an EIS which meets the requirements of NEPA and accordingly there is no warrant under NEPA for invalidating the EIS for Sale No. 39 on the grounds that additional studies are required. *Sierra Club* v. *Morton (MAFLA)*, 510 F.2d 813 (C.A. 5, 1975); *Union of Concerned Scientists* v. *AEC*, 499 F.2d 1069 (C.A.D.C., 1974); *Citizens for Safe Power, Inc.* v. *NRC*, 524 F.2d 129 (C.A.D.C. 1975).

8. NEPA does not require that a complete and distinct environmental analysis be prepared on the OCS Operation Orders issued by the Secretary in conjunction with Sale No. 39 either in a separate document or as part of the site-specific EIS for that sale. It was within the OCS Orders within the context of the EIS for Sale No. 39. Plaintiffs' contrary contention rests upon the regional

application of the OCS Operation Orders to possible Alaska OCS areas outside the Sale No. 39 area. But the Supreme Court has recently stated in rejecting the analogous assertions that a regional EIS, in additions to existing site-specific EIS, was required for coal leasing projects:

> "The determination [as to whether] . . . a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the inter-relationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the reponsible federal agencies. *Cf.* SCRAP II, *supra,* at 325-326. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately." *Kleppe* v. *Sierra Club, supra,* 44 U.S.L.W. at 5110.

Plaintiffs have not proven that the agency's action in considering the Operating Orders in the EIS was arbitrary or capricious.

9. Plaintiffs argue that the Secretary erred in failing to consider in the EIS the alternative of using termination clauses in the leases for OCS Sale No. 39 and that the Secretary erred in failing to include termination clauses in the leases. Both contentions are without merit. NEPA does not require consideration of lease termination clauses in an EIS and the OCS statute precludes the inclusion of termination clauses in the leases. The OCS Act states that leases shall be "issued only under the provisions of this Act," 43 U.S.C. 1333, and the Act provides at section 1337(b), 43 U.S.C. § 1334(b):

> 'An oil and gas lease issued by the Secretary pursuant to this Section *shall* . . . (2) be for a period of five (5) years *and* as long thereafter as oil or gas may be produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon, . . ." [Emphasis supplied.]

This section requires the Secretary to issue leases for the fixed term referred to in the Act, not for one subject to reduction because of new environmental or other reasons. In addition, § 1334(a)(1) of the Act, which provides for the issuance of Department regulations relating to OCS leasing, refers only to "suspension of production or operations," not to their termination. Subsections 1334(b)(1)(1 & 2) of the OCS Act provide that leases can be forfeited or cancelled—*e.g.,* terminated—*only* if the lessor "fails to comply with . . . the regulations" which the Secretary is legally authorized to issue. Thus, the only termination power relates to the failure of the lessors to conform their conduct to standards previously set forth by the Secretary, not to the discovery of new environmental information. Finally, §§ 1341(e & d) allow for suspension only in national defense or national emergency siutations. CEQ has noted that with regard to the Secretary's authority, existing law has no provision for permanently denying the right to develop a lease." (2d Doremus Aff. Ex. 1). The "Secretary may only order a temporary 'suspension of operations.'"

10. The Court has considered all other issues and arguments raised by plaintiffs and finds them to be without merit.

Upon consideration of all the foregoing the Court enters the following:

Judgment

The issues in this action having been duly tried and the Court having entered herein its Findings of Fact and Conclusions of Law it is

ORDERED and ADJUDGED that the plaintiffs take nothing, and that this action be, and the same hereby is, dismissed on the merits.

Supreme Court, U. S.
FILED
SEP 29 1978
MICHAEL RODAK, JR., CLERK

No. 78-40

In the Supreme Court of the United States

OCTOBER TERM, 1978

WESTERN OIL & GAS ASSOCIATION, ET AL., PETITIONERS

v.

STATE OF ALASKA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. The State of Alaska and several other plaintiffs[1] filed suit to enjoin the Secretary of the Interior from issuing oil and gas leases covering portions of the Outer Continental Shelf (OCS) in the Northern Gulf of Alaska. Plaintiffs alleged that the Secretary had failed adequately to consider the environmental impact of issuing such leases, as required under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA) (Pet. App. 52a-53a). Petitioners Western Oil & Gas Association, and 11 of its petroleum company members who were seeking to acquire such leases, intervened in the district court as defendants (Pet. App. 52a).

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[1]The City of Yakutat, United Fishermen of Alaska, and the Cordova District Fisheries Union were also plaintiffs in the district court (Pet. App. 52a).

The district court denied plaintiffs' motion for a preliminary injunction to delay issuance of the leases and the court of appeals declined to grant an injunction pending appeal (Pet. App. 2a). Thereafter, the Secretary issued the leases on 76 off-shore tracts (Pet. App. 57a-58a). The case was then submitted to the district court for decision on the merits. The district court held that the Secretary had complied with the requirements of NEPA and entered a judgment dismissing the complaint (Pet. App. 2a, 65a).

On appeal, the court of appeals held that the Secretary had not fully satisfied the requirements of NEPA in two respects. First, the court held that the environmental impact statement (EIS) prepared by the Secretary had failed to give sufficient attention to the provisions of the Secretary's "operating orders" regulating the oil and gas extraction activities of the lessees (Pet. App. 25a-32a). The court directed the Secretary to prepare a supplemental EIS that would analyze alternative operating orders, and the Secretary is now complying with that portion of the court's decision. Petitioners do not seek review of this aspect of the decision of the court of appeals (Pet. 10 n. 7).

The court of appeals also concluded that the EIS was deficient because it failed to analyze the possibility of issuing leases containing "termination clauses" (Pet. App. 32a-42a). Such clauses would empower the Secretary to cancel a previously issued lease in the event that unanticipated environmental hazards developed as a result of oil and gas extraction in off-shore waters. The EIS had not addressed the use of such clauses because the Secretary then believed that the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, did not authorize cancellation unless the lessee violated the Act, the

Secretary's regulations, or the terms of the lease (Pet. App. 33a). The court of appeals concluded, however, that the Secretary's existing statutory authority permitted use of termination clauses, and that the Secretary should have evaluated such clauses in the EIS (Pet. App. 41a-42a).

The court's interpretation of the Secretary's authority purported to be wholly declaratory and prospective in nature (Pet. App. 40a, 42a, 45a). The court declined to require the Secretary to alter the leases previously issued, noting the "grave legal tangles" (Pet. App. 46a) that might result if the Secretary attempted to insert termination clauses in them. The court also declined to invalidate the leases previously issued (Pet. App. 42a-45a).

Petitioners contend in the petition for certiorari that the court of appeals erred in interpreting Section 5 of the Outer Continental Shelf Lands Act, 43 U.S.C. 1334, because that provision does not authorize the Secretary to issue leases including termination provisions (Pet. 11-23).

2. Petitioners' objection to the interpretation of the court of appeals has been rendered moot by the passage of the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, signed into law on September 18, 1978. A copy of the relevant portions of the new Amendments is attached as an appendix hereto. Section 204 of the Amendments, amending Section 5 of the Act, grants the Secretary authority to adopt regulations providing for the cancellation of oil and gas leases due to serious harm or damage to the environment. The Amendments also direct the Secretary to promulgate regulations providing for compensation of lessees whose leases have been cancelled. Whether the court of appeals correctly interpreted the original statute is now irrelevant, since all future actions of the Secretary must comply with the amended statute which provides for lease cancellation.

There is no need for review by this Court of a lower court interpretation of a superseded statutory provision. See, *e.g.*, *Morris* v. *Weinberger*, 410 U.S. 422 (1973); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115-116 (1920); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969); *Quinn* v. *Muscare*, 425 U.S. 560, 563 (1976).[2]

3. On September 18, 1978, petitioners filed a supplemental memorandum entitled "Petitioners' Memorandum In Response To Suggestion That The Cause Is Moot," which acknowledges that "the issue raised in the petition is now moot." Petitioners accordingly request that their petition be granted, that Part II-C of the decision below be vacated, and that the cause be remanded for dismissal of paragraph 37(j) of the complaint. We concur in that request in light of the mootness of the issue raised in the petition. See *Hall* v. *Beals*, *supra*, 396 U.S. at 50.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, Part II-C of the decision below vacated, and the case remanded to the district court for dismissal of paragraph 37(j) of the complaint.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1978

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[2]The statutory amendments also render moot petitioners' challenge to certain regulations, issued by the Secretary during the pendency of this litigation, that provided for termination of leases under certain circumstances (Pet. 8-9, 11). Petitioners challenged those regulations in *Western Oil & Gas Association* v. *Andrus*, No. 77-3987 (C.D. Cal.), alleging that the regulations denied lessees just compensation in the event of lease termination. On August 2, 1978, the district court granted WOGA's motion for summary judgment and invalidated the regulations.

APPENDIX

AN ACT

To establish a policy for the management of oil and natural gas in the Outer Continental Shelf; to protect the marine and coastal environment; to amend the Outer Continental Shelf Lands Act; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Outer Continental Shelf Lands Act Amendments of 1978".

* * * * *

OUTER CONTINENTAL SHELF EXPLORATION AND DEVELOPMENT ADMINISTATION

SEC. 204. Section 5 of the Outer Continental Shelf Lands Act (43 U.S.C. 1334) is amended to read as follows:

"SEC. 5 ADMINISTRATION OF LEASING OF THE OUTER CONTINENTAL SHELF.—(a) The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or

maintained under the provisions of this Act. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

"(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

"(2) with respect to cancellation of any lease or permit—

"(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

"(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

"(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

"(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

"(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

"(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any,

over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before the date of enactment of this subparagraph, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

"(3) for the assignment or relinquishment of a lease;

"(4) for unitization, pooling, and drilling agreements;

"(5) for the subsurface storage of oil and gas other than by the Federal Government;

"(6) for drilling or easements necessary for exploration, development, and production;

"(7) for the prompt and efficient exploration and development of a lease area; and

"(8) for compliance with the national ambient air quality standards pursuant to the

Clean Air Act (42 U.S.C. 7401 et seq.), to the extent that activities authorized under this Act significantly affect the air quality of any State.

"(b) The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act.

"(c) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this Act, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

"(d) Whenever the owner of any producing lease fails to comply with any of the provisions of this Act, of the lease, or of the regulations issued under this Act, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this Act.

"(e) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 21(b) of this Act) assuring maximum

environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act.

"(f)(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

"(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

"(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks

related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

"(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

"(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

"(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

"(g)(1) The lessee shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

"(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

"(h) The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

"(i) After the date of enactment of this section, no holder of any oil and gas lease issued or maintained pursuant to this Act shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.".

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 78-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

WESTERN OIL & GAS ASSOCIATION, ET AL.,
Petitioners,

v.

STATE OF ALASKA, ET AL.,
Respondents.

PETITIONERS' MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

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WESTERN OIL & GAS ASSOCIATION, ET AL.,
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STATE OF ALASKA, ET AL.,
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PETITIONERS' MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

On July 6, 1978, the Western Oil and Gas Association and eleven of its members (WOGA) filed a petition for a writ of certiorari to review a portion of a decision rendered on February 28, 1978, by the United States Court of Appeals for the District of Columbia Circuit. That petition dealt exclusively with part II-C of the court of appeals' opinion, in which it interpreted Section 5 of the Outer Continental Shelf (OCS) Lands Act of 1953, 43 U.S.C. § 1334, as vesting the Secretary of the Interior with discretion to issue oil and gas leases for OCS tracts which could be cancelled for environmental reasons, without payment of compensation to the lessee. This interpretation of the OCS Lands Act led the court of appeals to reverse the district court on this point, while affirming it on most others. The court of appeals went on to issue a declara-

tory judgment that, in order to comply with the National Environmental Policy Act, 42 U.S.C. § 4231 (NEPA), the Secretary should in the future consider the issuance of such terminable leases as an "alternative" to the non-terminable leases which he had consistently issued in the past.[1]

While WOGA's petition was pending in this Court, Congress adopted many substantial amendments to the OCS Lands Act. Among the provisions in the new legislation is one amending Section 5 of the OCS Lands Act to direct the Secretary to issue regulations providing for the cancellation of OCS leases for environmental reasons, albeit with a requirement that, when leases are so cancelled, the government must pay lessees compensation pursuant to a formula outlined in the Act.[2] This legislation was signed by President Carter on September 18, 1978.

On September 5, 1978, anticipating President Carter's signature of the amendments, the State of Alaska filed a typewritten submission with the Court arguing that the passage of the OCS Lands Act amendments makes the issue raised in WOGA's petition moot. The State further argued that the mootness of the petition required that it be denied. (See App. 1a).

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[1] As WOGA pointed out in its petition (pp. 9-10), the court of appeals did not apply this interpretation of NEPA to invalidate the Secretary's decision to issue non-terminable leases for the OCS sale then under review. Instead, the lower court confined this aspect of its NEPA ruling to a purely prospective declaratory judgment regarding the Secretary's conduct of future OCS sales.

[2] A copy of Section 204 of the Amendments, which revises Section 5 of the 1953 Act, was attached to the Memorandum for the Secretary of the Interior filed by the Solicitor General in this case on September 29.

On September 18, the date of the President's signature of the amendments, WOGA filed a typewritten response to Alaska's September 5 submission. (See App. 3a). In WOGA's September 18 submission, it agreed that the case was moot, but disagreed that its petition should be denied. Instead, WOGA argued that the practice in this Court in such cases is to grant the petition, vacate the mooted aspects of the judgment, and remand for dismissal of the portion of the complaint which gives rise to the mooted issue.

On September 29, the Solicitor General filed a memorandum with this Court on behalf of the Secretary of the Interior, a defendant-appellee below, agreeing with the conclusions expressed in WOGA's September 18 submission.

On October 2, undersigned counsel for WOGA was contacted by the Clerk of this Court and informed that, since Alaska's September 5 typewritten submission was not being circulated to the Court, WOGA's September 18 response would similarly not be circulated. The Clerk stated that, if WOGA wished to make its views as to the mootness question known to this Court, it should file a printed brief with respect to this question. This memorandum is accordingly now being filed with the Court.

There is no question but that, as all parties now agree, the issue presented in WOGA's petition is moot. Under the new legislation, the Secretary must now provide for terminable leases. That being the case, the court of appeals' declaratory judgment that the Secretary must in the future consider the use of such leases as an "alternative" to the issuance of non-terminable leases is of no force or effect.

This Court's consistent practice in federal litigation that has been rendered moot during the pendency of a certiorari petition is to grant the petition, vacate the judgment of the court of appeals, and remand the case to the district court for dismissal of that portion of the complaint which has been rendered moot. *See, United States* v. *Munsingwear,* 340 U.S. 36 (1950); R. Stern and E. Gressman, *Supreme Court Practice* § 18.3, at 593-94 (4th ed. 1969).

Thus, this Court should now grant WOGA's petition, vacate part II-C of the opinion below, and remand the case to the United States District Court for the District of Columbia for dismissal of paragraph 37(j) of the plaintiffs' complaint.

Respectfully submitted,

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October 6, 1978

APPENDIX

APPENDIX

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

POUCH K STATE CAPITOL
JUNEAU, ALASKA 99311

September 5, 1978

Mr. Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: Western Oil and Gas Assn.
v. State of Alaska, No. 78-40

Dear Mr. Rodak:

Pursuant to Supreme Court Rule 24(3), respondent State of Alaska waives its right to file a responsive brief to the brief in support of petition for writ of certiorari filed on July 6, 1978. Comprehensive amendments to § 5(a)(1) of the Outer Continental Shelf Lands Act ("OCS Act) (43 U.S.C. § 1334(a)(1)), as written by the conference committee, have now passed both houses of Congress. 9 Bureau of National Affairs, Environment Reporter Current Developments 698 (August 25, 1978). The conference bill's amendments to § 5(a) are reprinted at 124 Cong. Rec. H. 8370 (daily ed. August 10, 1978). Because the petition for certiorari centers on the issue of whether § 5(a) of the OCS Act allows the Department of Interior to issue oil and gas leases with a clause allowing termination of the

leases for environmental reasons—an issue resolved by § 204 of the conference bill—the matter is now clearly moot, and the petition is thus without merit.

Sincerely,

/s/ AVRUM M. GROSS
Avrum M. Gross
Attorney General

AMG:JKT:dlm

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-40

WESTERN OIL & GAS ASSOCIATION, *et al.*,
Petitioners,

v.

STATE OF ALASKA, *et al.*,
Respondents.

Petitioners' Memorandum in Response to Suggestion That the Cause Is Moot

Petitioners herein respond to the September 5, 1978, letter of the Attorney General of the State of Alaska to the Clerk of the Court.

On July 6, 1978, the Western Oil and Gas Association and eleven of its members (WOGA) filed a petition for a writ of certiorari to review a decision rendered on February 28, 1978 by the United States Court of Appeals for the District of Columbia Circuit. That petition dealt exclusively with part II-C of the court of appeals' opinion, in which it interpreted Section 5 of the Outer Continental Shelf (OCS) Lands Act of 1953, 43 U.S.C. § 1334, as vesting the Secretary of the Interior with discretion to issue oil and gas leases for OCS tracts which could be cancelled for environmental reasons, without payment of compensation to the lessee. This interpretation of the OCS Lands Act led the

court of appeals to reverse the district court and to issue a declaratory judgment that, in order to comply with the National Environmental Policy Act, 42 U.S.C. § 4231 (NEPA), the Secretary should in the future consider the issuance of such terminable leases as an "alternative" to the non-terminable leases which he had consistently issued in the past.[1]

While WOGA's petition was pending in this Court, Congress adopted the amendments to the OCS Lands Act referred to in the Alaska Attorney General's September 5 letter. Among the many provisions in the new legislation is one amending Section 5 of the OCS Lands Act to direct the Secretary to issue regulations providing for the cancellation of OCS leases for environmental reasons, albeit with a requirement that when leases are so cancelled the government must pay lessees compensation pursuant to a formula outlined in the Act.[2] The legislation was signed by President Carter on September 18, 1978.

The State of Alaska argues that the passage of the OCS Lands Act amendments makes the issue raised in WOGA's petition moot. The State further argues that the mootness of the petition requires that it be denied.

We do not disagree with the State of Alaska's claim that the issue raised in the petition is now moot. Under

[1] As WOGA pointed out in its petition (pp. 9-10), the court of appeals did not apply this interpretation of NEPA to invalidate the Secretary's decision to issue non-terminable leases for OCS Sale No. 39. Instead, the lower court confined this aspect of its NEPA ruling to a purely prospective declaratory judgment regarding the Secretary's conduct of future OCS sales.

[2] A copy of Section 204 of the Amendments, which revises Section 5 of the 1953 Act, is attached hereto.

the new legislation, the Secretary must now provide for terminable leases. That being the case, the court of appeals' declaratory judgment that the Secretary must consider the use of such leases as an "alternative" to the issuance of non-terminable leases is of no force or effect.

We do disagree with the State of Alaska, however, as to the proper disposition of WOGA's petition in the light of the mootness of this cause. This Court's consistent practice in federal litigation that has been rendered moot during the pendency of a certiorari petition is to grant the petition, vacate the judgment of the court of appeals, and remand the case to the district court for dismissal of that portion of the complaint which has been rendered moot. *See, United States* v. *Munsingwear,* 340 U.S. 36 (1950); R. Stern and E. Gressman, *Supreme Court Practice,* § 18.3, at 593-94 (4th ed. 1969).

Thus, this Court should now grant WOGA's petition, vacate part II-C of the opinion below, and remand the case to the United States District Court for the District of Columbia for dismissal of paragraph 37(j) of the plaintiffs' complaint.

Respectfully submitted,

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September 18, 1978